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No.

IN THE

Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that "post-enactment purchasers cannot challenge a regulation under the Takings Clause." *Id.* at 626. In this case, a divided *en banc* panel of the Ninth Circuit distinguished *Palazzolo* on the basis that the plaintiff there had acquired the property by operation of law (instead of purchasing it) and held that the fact that petitioners had purchased the property subject to the challenged regulation was "fatal to [petitioners'] claim."

Is the purchaser of property subject to a regulatory restriction foreclosed from challenging the restriction as a violation of the Takings Clause?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are listed in the caption.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 8

I. THE NINTH CIRCUIT'S HOLDING THAT A POSTENACTMENT PURCHASER MAY NOT PREVAIL ON A TAKINGS CLAIM CONFLICTS WITH *PALAZZOLO* AND OTHER DECISIONS OF THIS COURT 9

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE FEDERAL CIRCUIT AND SEVERAL STATE APPELLATE COURTS 18

III. ADHERENCE TO THIS COURT'S HOLDINGS IN *PALAZZOLO* AND *NOLLAN* IS EXCEEDINGLY IMPORTANT FOR PRIVATE PROPERTY RIGHTS AND ECONOMIC FAIRNESS 23

IV. PETITIONERS HAVE SUFFERED A COMPENSABLE REGULATORY TAKING 25

CONCLUSION 27

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit (Dec. 22, 2010) 1a

APPENDIX B: Opinion of the United States Court of Appeals for the Ninth Circuit (Sept. 28, 2009) 55a

APPENDIX C: Judgment of the United States District Court for the Central District of California (Sept. 5, 2006) 142a

APPENDIX D: Order of the United States District Court for the Central District of California (Oct. 29, 2004) 148a

APPENDIX E: Statutory Provisions Involved 159a

TABLE OF AUTHORITIES

Page(s)

Cases

Andrus v. Allard,
444 U.S. 51 (1979) 12, 13

Appolo Fuels, Inc. v. United States,
381 F.3d 1338 (Fed. Cir. 2004) 19, 20

Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) 9

Commonwealth Edison Co. v. United States, 271 F.3d 1327 (Fed. Cir. 2001) 19

Cottonwood Farms v. Bd. of Cnty. Comm'rs, 763 P.2d 551 (Colo. 1988) 8, 20

E. Enters. v. Apfel,
524 U.S. 498 (1998) 18

First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) 9

Hodel v. Irving,
481 U.S. 704 (1987) 17

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 3, 10

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) 10

Mehling v. Town of San Anselmo,
No. A102563, 2004 WL 1179428
(Cal. App. 1st Dist. May 28, 2004) 22, 23

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987) 12, 16

Pa. Coal Co. v. Mahon,
260 U.S. 393 (1922) 5, 9

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) ..... *passim*

Penn Cent. Transp. Co. v. New York City,
438 U.S. 104 (1978) 4, 10, 27

Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County, 793 A.2d 545
(Md. 2002) 22

Rith Energy, Inc. v. United States,
270 F.3d 1347 (Fed. Cir. 2003) 19

R.R. Comm'n v. Pullman Co.,
312 U.S. 496 (1941) 3

Schooner Harbor Ventures, Inc. v. United States, 569 F.3d 1359 (Fed. Cir. 2009) 8, 18, 19

Stansbury v. Jones,
812 A.2d 312 (Md. 2002) 22

State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm'rs,
875 N.E.2d 59 (Ohio 2007) 21

State ex. rel. Shemo v. Mayfield Heights,
765 N.E.2d 345 (Ohio 2002) 21

Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002) 17

Travis v. County of Santa Cruz,
94 P.3d 757 (Cal. 2004) 23

Wensmann Realty, Inc. v. City of Egan,
734 N.W.2d 623 (Minn. 2007) 20, 21

Yee v. Escondido,
503 U.S. 519 (1992) 16, 26

Constitutional Provisions & Statutes

28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 3
U.S. Const. amend. V 1, 9
U.S. Const. amend. XIV 1

PETITION FOR A WRIT OF CERTIORARI

Petitioners Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals has been designated for publication and is electronically reported at 2010 WL 5174984. Pet. App. 1a. The opinions of the district court are unpublished. *Id.* at 142a, 148a.

JURISDICTION

The court of appeals filed its opinion on December 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

The relevant provisions of the Santa Barbara County Code are set forth in the appendix to this petition.

STATEMENT

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that "post-enactment purchasers cannot challenge a regulation under the Takings Clause," finding it to be "illogical," "unfair," and "capricious." *Id.* at 626–28. In this case, the Ninth Circuit barred petitioners' claim that a city ordinance effected a regulatory taking on the sole ground that the ordinance was "promulgated long before [petitioners] bought their land." Pet. App. 14a. Because that holding "directly contravenes Supreme Court precedent," *id.* at 35a (Bea, J., dissenting), as well as decisions of the Federal Circuit and numerous state appellate courts, this Court should grant certiorari.

1. In 1979, the county of Santa Barbara, California, adopted an ordinance that capped the rent that owners of mobile-home parks could charge tenants for use of the land. *See* Pet. App. 4a. The ordinance restricted owners to once-yearly rent increases and limited increases to 75% of inflation unless an arbitrator determines that a further increase is justified based on operating costs, capital investments, and other factors. *Id.* at 6a n.10, 160a–70a.

In 1997, petitioners purchased a mobile-home park in Santa Barbara County. Pet. App. 6a. Five years later, the area in which petitioners' park is located was incorporated into the new city of Goleta, which is the respondent here. *Id.* The City enacted an ordinance on the first day of its existence, February 1, 2002, that kept in force all pre-existing Santa Barbara County ordinances for a preliminary period of 120 days. *Id.* at 6a–7a. The City subsequently chose to readopt the full county code as its own law. *Id.* at 7a. In 2002, the application of the rent-control

ordinance to petitioners' property limited the rent that petitioners could collect to 20% of fair market levels. *Id.* at 31a (Bea, J., dissenting).

2. On March 25, 2002, petitioners filed suit against the City in the United States District Court for the Central District of California under 42 U.S.C. § 1983 and state law seeking a declaratory judgment that the ordinance was void and appropriate money damages. They alleged a number of federal- and state-law claims, including that the re-enacted ordinance violated the Fifth Amendment's Takings Clause (as incorporated against the States by the Fourteenth Amendment). Pet. App. 8a & n.9.

In October 2002, the district court stayed the action to permit the parties to litigate the state-law claims in California court. *See R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). After the parties settled those claims, the district court granted petitioners summary judgment on the takings claim, holding that the ordinance "fails to substantially advance its stated purpose" of creating affordable housing—the standard for regulatory-takings claims under then-governing Ninth Circuit precedent. Pet. App. 157a, 159a. The court found that because the ordinance "contain[ed] no mechanism for preventing mobile home owners from capturing the present value of the reduced rents as a premium on the sale of their mobile homes," it did not meet the goal of ensuring low-cost housing. *Id.* at 156a–57a.

While that ruling was on appeal, this Court decided *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), which rejected the Ninth Circuit's "substantially advances" standard. *See id.* at 548. The parties accordingly agreed to a vacatur of the district court's ruling and a remand. Pet. App. 9a.

Petitioners moved again for summary judgment, but the district court denied their motion. Pet. App. 142a. On the eve of trial, the district court *sua sponte* ordered petitioners to show cause why summary judgment should not be granted in favor of the City. The court entered judgment for the City on September 5, 2006. *Id.* at 142a–47a.

A divided panel of the Ninth Circuit reversed. *See* Pet. App. 55a–141a. The panel held that the ordinance constituted an unconstitutional regulatory taking, applying the three-factored balancing test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978): "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action." Pet. App. 97a. With respect to investment-backed expectations, the panel concluded that this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which authorized a takings claim by a plaintiff who did not own the property when the challenged regulation first went into effect, "permits property owners who have purchased property subject to the regulations they challenge to bring regulatory takings claims under *Penn Central*." Pet. App. 113a; *see also id.* at 109a ("Our analysis of this issue is controlled by *Palazzolo*.").

The panel further explained that on the facts of this case "the question of investment-backed expectations is not determinative but must be considered in tandem with the economic impact of the regulation on the Park Owners, and the character of the governmental action." Pet. App. 117a. The panel held that the "economic impact" of the ordinance was severe, given that petitioners had presented evidence that the ordinance caused them to rent their prop-

erty "at close to an 80 percent discount below the market rate," and that the character of the governmental action was such that it "[s]ing[led] out mobile home park owners" while declining to "impose comparable costs on any other property owners in the City." *Id.* at 100a, 120a, 122a. Weighing all three factors, the panel held that "[o]n balance, the [ordinance] 'goes too far' and constitutes a regulatory taking under the Fifth and Fourteenth Amendments for which just compensation must be paid." *Id.* at 123a (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Judge Kleinfeld dissented on the ground that petitioners had "purchased the park after the regulatory takings" had occurred. *Id.* at 133a (Kleinfeld, J., dissenting).

3. The Ninth Circuit granted the City's petition for rehearing *en banc* in March 2010, vacating the panel's opinion. A divided 11-member panel of the court then affirmed the district court. Pet. App. 1a–25a. The majority held that the *Penn Central* factor of "'the extent to which the regulation has interfered with distinct investment-backed expectations'" was "fatal to [petitioners'] claim." *Id.* at 18a. Because the City's ordinance was "promulgated long before [petitioners] bought their land," the majority stated, "the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.* at 14a, 18a. Petitioners "could have no 'distinct investment-backed expectations' that they would obtain illegal amounts of rent." *Id.* at 19a.

The *en banc* majority distinguished *Palazzolo* on the ground that the takings claim there was an "as-applied" challenge in which title to the property had passed to the plaintiff by operation of law before the claim was ripe—not a "facial" challenge in which the

prior owner could have brought a takings claim before selling the property. Pet. App. 15a–16a. Although *Palazzolo* broadly rejected the proposition that "postenactment purchasers cannot challenge a regulation under the Takings Clause" merely because they "purchased or took title with notice of the limitation," 533 U.S. at 626, the Ninth Circuit held that *Palazzolo* did not control because in that case "title shifted to [the plaintiff] because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation." Pet. App. 15a.

Rather than independently analyzing the other *Penn Central* factors, the *en banc* panel held that the fact that petitioners purchased the property after the ordinance first went into effect was conclusive as to them as well: There was no "economic effect" on petitioners because "[w]hatever unfairness . . . might have been imposed by rent control . . . was imposed long ago, on someone earlier in the Guggenheims' chain of title," and the City's readoption of the ordinance "did not adjust the benefits and burdens of economic life," but rather "left them as they had been for many years." Pet. App. 21a.

Judge Bea dissented, joined by Chief Judge Kozinski and Judge Ikuta. *See* Pet. App. 25a–54a. He explained that the majority opinion "flouts the Supreme Court's holding in *Palazzolo* that a 'postenactment transfer of title [does not] absolve the [government] of its obligation to defend' the restrictions a regulation imposes on property-owners." *Id.* at 46a (quoting *Palazzolo*, 533 U.S. at 627). Because "the Supreme Court has specifically held that the fact claimants knew of a land-use regulation at the time they took title to their land does *not* bar them from challenging that regulation, nor from contend-

ing that the ordinance lessened the value of their land by interference with their investment-backed expectations," the majority opinion "directly contravenes Supreme Court precedent." *Id.* at 34a–35a (emphasis in original). The majority's "attempts to distinguish *Palazzolo*" on the grounds that it addressed an as-applied challenge and that the transfer there had been effected by operation of law were misguided, Judge Bea stated, because this Court's precedents "gave us rules of general application as to what constitutes a regulatory taking" that do not turn on those facts. *Id.* at 36a. It therefore did "not come as a surprise," he wrote, that "the majority's stance on this subject comes without legal authority." *Id.*

Judge Bea further explained that the majority's "misprism [*sic*] of Supreme Court precedent is made worse by the majority opinion's failure to recognize specific evidence of [petitioners'] investment-backed . . . expectations." Pet. App. 37a. Petitioners had proffered evidence demonstrating that they had reasonably believed when they purchased the property that the ordinance would be abolished or invalidated. *See id.* at 37a–39a. Analyzing that evidence and applying all three of the *Penn Central* factors, Judge Bea concluded that "[a]t a *minimum*, the case should be remanded for trial on the severity of the economic impact on the claimants, the existence of investment-backed expectations, and the character of the governmental action." *Id.* at 46a (emphasis in original). "[T]hese are at least mixed questions of fact and law," Judge Bea stated, "on which reasonable triers of fact could find that there was a taking." *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for certiorari and either summarily reverse or schedule the case for full briefing and argument. As the dissent noted, the Ninth Circuit's decision "directly contravenes" *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), by "holding as a matter of law[] that the Ordinance could not interfere with [petitioners'] 'distinct investment-backed expectations'" because it predated their acquisition of the property. Pet. App. 28a, 35a (Bea, J., dissenting). The purported distinctions that the majority drew with *Palazzolo* "are mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California." *Id.* at 36a–37a.

Because the import of *Palazzolo* is so clear, it should come as little surprise that the decision below also conflicts with precedents from the Federal Circuit and numerous state appellate courts faithfully applying this Court's holding. The Federal Circuit has squarely held, in the context of postenactment purchasers, that *Palazzolo* "reject[ed] the argument that one who acquires title after the relevant regulation was enacted could never bring a takings claim." *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1366 (Fed. Cir. 2009). And both before and after *Palazzolo*, the "majority of [state appellate] courts ha[d] held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds." *Cottonwood Farms v. Bd. of Cnty. Comm'rs*, 763 P.2d 551, 555 (Colo. 1988).

The decision below represents a major blow to private property rights and promises to augment the

power of state and local governments to enact confiscatory land-use regulations without paying just compensation. In addition, the decision will cause perverse effects in local real-estate markets, as property owners will be reluctant to sell property subject to new regulations imposing potentially compensable takings. This Court's review is warranted.

I. THE NINTH CIRCUIT'S HOLDING THAT A POSTENACTMENT PURCHASER MAY NOT PREVAIL ON A TAKINGS CLAIM CONFLICTS WITH *PALAZZOLO* AND OTHER DECISIONS OF THIS COURT.

1. The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The "basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First Lutheran Church v. Los Angeles Cnty.*, 482 U.S. 304, 315 (1987). The Takings Clause applies to the States through the Fourteenth Amendment. *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238–39 (1897).

For nearly one hundred years, this Court has recognized that a compensable taking can occur not only when the government physically seizes or intrudes upon land, but also when it enacts a "regulation [that] goes too far" in diminishing the value of the property. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). For example, if a regulation "deprive[s] an owner of '*all* economically beneficial us[e]' of her property," the regulation categorically qualifies as a taking that requires just compensation. *Lingle v.*

Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)) (emphasis and alteration in original).

When a regulation does not deplete the property of all value, the question whether it amounts to a taking is governed by the flexible test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the purpose of which is to prevent "some people alone [from] bear[ing] public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 123–24. Although the *Penn Central* test eschews "any 'set formula'" in favor of "essentially ad hoc, factual inquiries," this Court has enumerated "factors that have particular significance." *Id.* at 124. Those factors include (1) "'[t]he economic impact of the regulation on the claimant'"; (2) "'the extent to which the regulation has interfered with distinct investment-backed expectations'"; and (3) "'the character of the governmental action.'" *Lingle*, 544 U.S. at 538–39 (quoting *Penn Central*, 438 U.S. at 124).

2. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court addressed whether a plaintiff could prevail on a regulatory takings claim if he did not own the property at the time the challenged regulation was enacted. In *Palazzolo*, a corporation had purchased a parcel of land but had been repeatedly denied permission by the state of Rhode Island to develop the land over a period of years. During the administrative proceedings, the corporation dissolved and title to the property passed to its sole shareholder. The shareholder eventually brought an inverse condemnation action in state court, challenging the state's actions as a regulatory taking under *Penn Central*. The Rhode Island Supreme Court denied his claim, finding "the date of acquisition of the

parcel [to be] determinative," and holding that "he could have had 'no reasonable investment-backed expectations that were affected by this regulation' because it predated his ownership." *Id.* at 616.

Reviewing that decision, this Court considered whether "acquisition which postdates the regulation" bars a regulatory takings claim. 533 U.S. at 618. The Court rejected what it described as the Supreme Court of Rhode Island's "single, sweeping rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier enacted restriction and is barred from claiming that it effects a taking." *Id.* at 626. The Court explained that the "theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause" was that "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value." *Id.*

"The State," this Court explained in declining to adopt that reasoning, "may not put so potent a Hobbesian stick into the Lockean bundle." 533 U.S. at 627. "Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule." *Id.*

The Court observed that Rhode Island's proposed rule threatened not only postenactment purchasers, but also the original property owners: "The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is

stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself." 533 U.S. at 627. The theory that postenactment purchasers could not prevail on takings claims was, the Court said, "quixotic" and "capricious in effect"—"[t]he young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions." *Id.* at 628.

The Court drew its holding in *Palazzolo* from its prior decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which it described as "controlling precedent." 533 U.S. at 629. In *Nollan*, the question presented was whether a state government could condition a development permit on the property owner's consent to a public easement across the property. 483 U.S. at 827. The principal dissent had argued that because the state had established a blanket policy of requiring such easements well before the plaintiffs had purchased their property, the plaintiffs had been "'on notice that new developments would be approved only if provisions were made for lateral beach access.'" *Palazzolo*, 533 U.S. at 629 (quoting 483 U.S. at 860 (Brennan, J., dissenting)). But "[a] majority of the Court rejected the proposition": "'So long as the Commission could not have deprived the prior owners of the easement without compensating them,' the Court reasoned, 'the prior owners must be understood to have transferred their full property rights in conveying the lot.'" *Id.* at 629 (quoting 583 U.S. at 834 n.2).

Even before *Nollan*, this Court had rejected the position that postenactment purchasers could never prevail on a regulatory takings claim. In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court considered the

constitutionality of a prohibition on the sale of parts of birds legally killed before a ban on their killing had gone into effect. *See id.* at 52. Although the Court ultimately upheld the challenged regulations after conducting a full *Penn Central* analysis, it refused to adopt the government's threshold argument that the takings claim was barred because the plaintiffs had "not clearly stated that they acquired their property interest in the bird artifacts before the sales ban came into force." *Id.* at 64 n.21. The "timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations," the Court held, "but it does not erect a jurisdictional obstacle at the threshold." *Id.* Although couched in terms of standing, the decision in *Andrus* clearly eschewed a bright-line rule barring all takings claims by a postenactment purchaser, in line with the subsequent decisions in *Palazzolo* and *Nollan*.

3. Justices Scalia and O'Connor each wrote concurrences in *Palazzolo* further explaining why they rejected a rule prohibiting postenactment purchasers from prevailing on regulatory takings claims. Justice Scalia drew a bright line: "In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." 533 U.S. at 637. That is because the "'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional." *Id.*

Justice O'Connor set forth a more flexible test through which the fact that a purchaser bought with notice of the challenged regulation would be one fac-

tor in the overall analysis. She agreed that "the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use." 533 U.S. at 632. Although the "regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [the claimant's] expectations," the "state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations," and, furthermore, "the degree of interference with investment-backed expectations . . . is [only] *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" *Id.* at 634 (emphasis in original). Justice O'Connor cautioned that "[i]f investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title." *Id.* at 635.

Even in dissent, Justice Breyer stated that he "agree[d] with Justice O'Connor" that "much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist." 533 U.S. at 654–55.

4. The Ninth Circuit's holding cannot be reconciled with this Court's holdings in *Palazzolo*, *Nollan*, or *Andrus* or any of the Justices' separate opinions addressing the issue of postenactment purchasers. The Ninth Circuit held that the investment-backed expectations factor was "fatal to [petitioners'] claim." Pet. App. 18a. Petitioners "could have no 'distinct

investment-backed expectations,'" the majority reasoned, because "the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.* at 18a–19a. In other words, public notice of a value-depleting regulation is sufficient to bar a subsequent purchaser from challenging it under *Penn Central*. That holding is incompatible with this Court's teaching that "the postenactment transfer of title [does not] absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." 533 U.S. at 627.

The Ninth Circuit distinguished *Palazzolo* on the ground that in that case "title shifted to [the plaintiff] because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation." Pet. App. 15a. That distinction between purchasers and those who acquire land by operation of law cannot be squared with the rule set out in *Palazzolo*, which repeatedly referred to "postenactment *purchasers*," not merely those who acquire property by operation of law. 533 U.S. at 626 (emphasis added); *see also, e.g.*, *id.* at 628 ("A blanket rule that *purchasers* with notice have no compensation right when a claim becomes ripe is too blunt an instrument . . . .") (emphasis added). Indeed, one of the concerns driving the Court's analysis in *Palazzolo* was that a contrary rule would capriciously penalize "the owner with the need *to sell*" by denying him the ability to obtain full value for the land, in contrast with "the owner with the resources to hold" while challenging the regulation in court. *Id.* (emphasis added).

If there were any doubt that *Palazzolo*'s holding extended to purchasers, *Nollan* would dispel it. The plaintiffs in *Nollan* had purchased their property

"well after the [government] had begun to implement its policy," but this Court rejected the proposition that their "rights [were] altered" as a result. 483 U.S. at 827–28, 833 n.2. "So long as the [government] could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* Given that *Nollan*'s holding indisputably concerned post-enactment *purchasers*, and *Palazzolo* cited *Nollan* as "controlling precedent," there can be no doubt that the Ninth Circuit erred in distinguishing *Palazzolo* on the ground that the transfer to the plaintiff has been effected by operation of law. The dissent below was therefore correct that "the majority opinion provides no justification or legal support for why these proposed distinctions matter." Pet. App. 37a (Bea, J., dissenting).[1]

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[1] The Ninth Circuit also distinguished *Palazzolo* on the ground that it addressed an "as-applied" challenge—that is, a lawsuit brought after the specific denial of a development application (*see* 533 U.S. at 616)—as opposed to a "facial" challenge that the regulation constitutes a taking "no matter how it is applied" (*Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Pet. App. 16a–17a. The Ninth Circuit presumed that *Palazzolo* was limited to as-applied challenges that ripened only after title passed to the new owner, but one searches the decision in vain for that limitation. In fact, *Palazzolo* makes clear that it is *not* limited to the relatively short period before an as-applied claim ripens: "*Future generations*," the Court said, "have a right to challenge unreasonable limitations on the use and value of land." 533 U.S. at 627 (emphasis added). Such a generational scope belies any notion that *Palazzolo* was restricted to the narrow temporal window during which an as-applied claim ripens. Were the holding of *Palazzolo* so limited, the government could succeed in "put[ting] an expiration date on the Takings Clause"—precisely the result *Palazzolo* aimed to avoid. *Id.*

Because the Ninth Circuit ruled that petitioners' postenactment acquisition of title alone was "fatal" to their claim, it did not apply the *Penn Central* test, failing "to provide any analysis of the general economic impact of the Goleta Ordinance on the claimant," the "specific evidence of [petitioners'] investment-backed expectations," or "the character of the governmental action." Pet. App. 29a–30a, 37a, 43a (Bea, J., dissenting). The Ninth Circuit thus ignored the principle that "the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations" and that "the degree of interference with investment-backed expectations . . . is [only] *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring).

Indeed, even aside from *Palazzolo*, the decision below ignored decades of this Court's precedent holding that investment-backed expectations are only one factor that must be balanced against the other *Penn Central* considerations. *See, e.g.*, *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 315 n.10 (2002) ("The *Penn Central* analysis involves a complex of factors . . . ."). And in appropriate cases, this Court has not hesitated to find a regulatory taking even in the absence of any recognizable investment-backed expectations. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (finding a regulatory taking even where evidence of investment-backed expectations was "dubious").

The decision below "flouts the Supreme Court's holding in *Palazzolo* that a 'postenactment transfer of title [does not] absolve the [government] of its obligation to defend' the restrictions a regulation im-

poses on property-owners." Pet. App. 46a (Bea, J., dissenting) (quoting *Palazzolo*, 533 U.S. at 627). This Court should therefore grant certiorari.

II. The Ninth Circuit's Decision Conflicts With Decisions Of The Federal Circuit And Several State Appellate Courts.

The Ninth Circuit's decision also conflicts with those courts that have faithfully applied *Palazzolo* according to its plain terms, as well as pre-*Palazzolo* state-court decisions.

1. Among the federal courts of appeals, the Federal Circuit hears the largest share of takings claims because the Court of Federal Claims has exclusive jurisdiction over claims seeking over $10,000 in damages from the federal government. *See E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (plurality op.). That circuit's oft-applied interpretation of *Palazzolo* directly conflicts with the holding of the Ninth Circuit. For example, in *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), a property owner challenged a determination by the U.S. Fish and Wildlife Service that it could not develop a parcel of land without meeting certain conditions because the land was part of a critical wildlife habitat under the Endangered Species Act. The Court of Federal Claims had suggested "that because the critical habitat designation occurred in 1977, subjecting the property to certain regulatory restrictions, and [the plaintiff] did not purchase the land until 2000," the plaintiff could not succeed on a takings claim. *See id.* at 1366.

The Federal Circuit rejected that line of reasoning. Citing *Palazzolo*, the court held that the plaintiff's "knowledge of the regulation is not per se dispositive, although it is a factor that may be considered,

depending on the circumstances." *Schooner Harbor Ventures*, 569 F.3d at 1366. Contrary to the interpretation of the Ninth Circuit, the Federal Circuit correctly explained that *Palazzolo* had "reject[ed] the argument that one who acquires title after the relevant regulation was enacted could never bring a takings claim." *Id.* The Federal Circuit instructed the Court of Federal Claims on remand not to deny the takings claim solely on that ground. *Id.*

Schooner Harbor Ventures was merely an application of the Federal Circuit's longstanding interpretation of *Palazzolo* as "reject[ing] the theory that 'a person who purchases property after the date of the regulation may never challenge the regulation.'" *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2003)). As the *en banc* Federal Circuit has put it, "[w]here a regulatory taking of real property is alleged, the state cannot defeat liability simply by showing that the current owner was aware of the regulatory restrictions at the time that the property was purchased." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (*en banc*).

The *en banc* Federal Circuit's faithful application of *Palazzolo* squarely conflicts with the *en banc* Ninth Circuit's holding below. The Federal Circuit has not restricted the *Palazzolo* rule to property owners who acquired an interest by operation of law or to situations where the previous owner's claim would not yet have been ripe. *See, e.g.*, *Schooner Harbor Ventures*, 569 F.3d at 1366 (plaintiff purchased land 23 years after critical wildlife designation); *Appolo Fuels*, 381 F.3d at 1342, 1348–51 (applying full *Penn Central* analysis to plaintiff that

purchased property "more than a decade after the enactment" of the challenged regulation).

2. Takings claims are most often litigated in state courts. Even prior to *Palazzolo*, the "majority of courts ha[d] held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds." *Cottonwood Farms v. Bd. of Cnty. Comm'rs*, 763 P.2d 551, 555 (Colo. 1988). And not surprisingly, since *Palazzolo*, those state courts of last resort to apply the decision have uniformly rejected the Ninth Circuit's contrary rule.

For example, in *Wensmann Realty, Inc. v. City of Egan*, 734 N.W.2d 623 (Minn. 2007), the Minnesota Supreme Court considered a challenge by the owner of a golf course to a city's ban on residential development enacted before the owner had purchased the property. *See id.* at 627.[2] Applying *Penn Central*, the court considered how his postenactment purchase impacted the "investment-backed expectations" factor. It explained that under *Palazzolo* the fact that "residential development of the property was prohibited when [the owner] purchased the property is relevant to determining the reasonableness of [his] expectations, but [his] awareness of the restrictions does not automatically defeat the takings claim," overruling the lower appellate court's contrary ruling. *Id.* at 638. It proceeded to analyze the specific facts relating to the owner's investment-

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[2] Although the Minnesota Supreme Court applied its own constitution's Takings Clause, it explained that "[w]e have . . . relied on cases interpreting the U.S. Constitution's Takings Clause in interpreting this clause in the Minnesota Constitution." *Id.* at 631–32.

backed expectations, ultimately concluding that the factor favored the city, and it separately analyzed the other *Penn Central* factors, resolving the "character of the government action" factor against the city and finding the record inconclusive on the "economic impact" factor. *Id.* at 639, 641. It accordingly remanded for further factual development of the "determinative factor in this case . . . whether the denial of the comprehensive plan amendment leaves the property owner with any reasonable use of the property." *Id.* at 641. In contrast to the Ninth Circuit's holding, the plaintiff's notice of the regulation before purchasing the property was not "fatal" to his claim.

Other state supreme courts have issued similar rulings in light of *Palazzolo*. In *State ex. rel. Shemo v. Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002), a challenge to a zoning ordinance by a postenactment purchaser, the Supreme Court of Ohio rejected the government's contention that "there can be no taking because the challenged single-family residential zoning existed at the time [the plaintiffs] acquired the property." *Id.* at 352. The Court explained that *Palazzolo* "rejected a similar argument that a purchaser or a successive title holder is deemed to have notice of an earlier-enacted land restriction and is barred from claiming that it effects a taking." *Id.*; *see also State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm'rs*, 875 N.E.2d 59, 67 (Ohio 2007) (purchasing property with notice of zoning regulations "is not necessarily a bar to a taking claim" though "a property owner's awareness of regulations may be relevant in a *Penn Cent.* partial taking.").

And immediately after *Palazzolo*, the Court of Appeals of Maryland (that State's highest court) overruled a prior precedent preventing postenactment purchasers from receiving just compensation.

In *Richard Roeser Professional Builder, Inc. v. Anne Arundel County*, 793 A.2d 545 (Md. 2002), the court considered whether a landowner could be denied a variance from a zoning law solely on the ground that "[a]t the time it contracted to purchase the property, [the purchaser] knew" of the zoning law. *Id.* at 547. The court noted that prior to *Palazzolo*, "there was some concern expressed in the land use community as to whether when a purchaser obtained title to property already subject to environmental restrictions, he . . . could not assert 'taking' claims, even if the restrictions denied him all viable economic use." *Id.* at 556. But, the court concluded, the "Supreme Court has now answered the questions raised." *Id.* It accordingly held, applying state law in light of the constitutional holding of *Palazzolo*, that a property owner is not barred from seeking a variance from a zoning law merely because he purchased with notice of the law. *Id.* at 560–61; *see also Stansbury v. Jones*, 812 A.2d 312, 326 n.11 (Md. 2002) ("Under the Supreme Court's case of [*Palazzolo*] and our recent case of *Roeser*, . . . the fact that the statute predated an owner's purchase of a subject property would have no bearing on the ability of an owner to seek variance relief.").

Perhaps most significantly, the Ninth Circuit's decision conflicts with the understanding of *Palazzolo* adopted by California appellate courts, resulting in an intra-state split of authority. In *Mehling v. Town of San Anselmo*, No. A102563, 2004 WL 1179428 (Cal. App. 1st Dist. May 28, 2004), California's First District Court of Appeal correctly explained—in direct conflict with both the holding and reasoning of the Ninth Circuit—that "[t]he Supreme Court's decision did *not* turn on th[e] fact" that title was transferred by operation of law." *Id.* at *6 n.6

(emphasis added). The "holding and rationale of *Palazzolo* apply regardless of whether title to the property is transferred by operation of law or purchased in an arm's length transaction." *Id.* The California Supreme Court has suggested that it concurs with this interpretation of *Palazzolo*. *See Travis v. County of Santa Cruz*, 94 P.3d 538, 545 (Cal. 2004) (explaining that *Palazzolo* discredited the "idea that a postenactment purchaser takes with notice of the legislation and therefore cannot claim it effects a taking").

* * *

Because the holding of the Ninth Circuit squarely conflicts with the precedents of this Court, the Federal Circuit, and numerous state appellate courts, including California courts, this Court should grant certiorari and resolve the conflict.

III. Adherence To This Court's Holdings In *Palazzolo* And *Nollan* Is Exceedingly Important For Private Property Rights And Economic Fairness.

In the decision below, the Ninth Circuit—which governs over one-third of the land area of the United States and one-fifth of its population[3]—erected an insuperable barrier to takings challenges to regulatory restrictions of all stripes once the affected property changes hands in the private market. Given the fluidity of the American real estate market, the decision effectively insulates a wide swath of potentially unconstitutional regulations from challenge and promises to award governments unlawful windfalls at the expense of property owners.

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[3] *See* http://quickfacts.census.gov/qfd/index.html (last visited Mar. 10, 2011).

Because it bars postenactment purchasers from challenging land-use regulations under the Takings Clause, "no matter how extreme or unreasonable," the Ninth Circuit's inflexible, bright-line rule will lead to harsh and unjust results. *Palazzolo*, 533 U.S. at 627. As this Court noted in *Palazzolo*, the rule is "capricious in effect," because "[t]he young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions." *Id.* at 628. For example, if a land-use regulation deprives a landowner of her only means of livelihood, she may not have the resources to engage in a protracted legal battle with the State government. But she will be unable to recover anything close to the full value of the property in the private market, no matter how obvious it is that the regulation qualifies as a taking under *Penn Central*, because potential purchasers will know that they will be unable to prevail on a takings claim. The holding below thus "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation." *Id.* at 627.

Moreover, the Ninth Circuit's rule would preclude challenges to regulations that have become compensable takings over time due to changes in market conditions. For example, as the dissent noted, a rent-control ordinance might not be sufficiently onerous at the time of enactment to qualify as a taking under *Penn Central*, but "as the years go by, . . . [the] disparity between market and regulated rents will increase and the magnitude of the [regulation's] impact will grow." Pet. App. 31a n.5 (Bea, J., dissenting). If the property changes hands in a market transaction during that time, the Ninth Circuit's rule

would bar a challenge that the statute effects a taking. And relatedly, the decision creates an incentive for state and local governments to keep in place regulations that have outlived their usefulness or have become unduly confiscatory because the adoption of new regulations could trigger the right of new owners to challenge them.

Perhaps of most consequence, the Ninth Circuit's holding threatens to slow activity in the local real-estate market whenever a potentially unconstitutional ordinance is enacted, because both purchasers and sellers will know that any takings claim will be extinguished if subject property is sold before the matter is resolved in court. The time value of the mutual gains from the delayed transactions will therefore be permanently lost. There is no sound reason for such a waste of resources in the purpose or history of the Takings Clause, this Court's precedents, or common sense.

IV. PETITIONERS HAVE SUFFERED A COMPENSABLE REGULATORY TAKING.

The Ninth Circuit *en banc* majority did not conduct the *Penn Central* analysis required by this Court's precedents, but both the original panel majority and the *en banc* dissent did conduct that analysis and found at least a question of fact precluding summary judgment. That analysis was correct. Under the first *Penn Central* factor, neither the parties nor the district court "dispute[d] that the Ordinance seriously impacted the value of [petitioners'] property." Pet. App. 30a (Bea, J., dissenting). Petitioners "presented evidence that the Ordinance deprives them of approximately 80% of the market value of their mobile home park land." *Id.* There is no serious doubt that "a finder of fact could easily de-

termine that a loss of 80% of the market value of property is . . . a severe economic burden." *Id.* at 32a.

As to petitioners' investment-backed expectations, petitioners "had a reasonable expectation of freeing their land from the Ordinance through political or legal means," a belief that was "at least plausible in light of contemporary legal, political, and academic thought." Pet. App. 39a, 43a (Bea, J., dissenting). Moreover, the fact that a new city with a new legal code was scheduled to replace the prior county government gave petitioners at least a reasonable prospect that the rent-control system would be eliminated or modified.

Finally, with respect to the character of the government action, because the ordinance "restricts only the amount the landowner can charge a tenant for rental of the mobile home parcel," not "the amount which that tenant, in turn, can demand for sale or lease of the mobile home," it fails to achieve its stated purpose of protecting "owners and *occupiers* of mobile-homes from unreasonable rents." Pet. App. 43–44a (Bea, J., dissenting). Rather, the "designed structure and working of the ordinance amounts to nothing more than a wealth transfer from the landowner to the original tenant, and indisputably does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home." *Id.* at 44a; *see Yee v. Escondido*, 503 U.S. 519, 530 (1992) (that an ordinance "transfers wealth only to the incumbent mobile home owner" bears on "whether the ordinance causes a regulatory taking"). One reasonably could conclude that Goleta's is not a "public program adjusting the benefits and burdens of economic life to promote the

common good," but rather a special-interest give-away. *Penn Central*, 438 U.S. at 124.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 11, 2011

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL GUGGENHEIM;
SUSAN GUGGENHEIM;
MAUREEN H. PIERCE,
Plaintiffs-Appellants,

v.

CITY OF GOLETA, a
municipal corporation,
Defendant-Appellee.

No. 06-56306

D.C. No.
CV-02-02478-FMC

OPINION

Appeal from the United States District Court
for the Central District of California
Florence-Marie Cooper, District Judge, Presiding

Argued and Submitted
June 22, 2010—Pasadena, California

Filed December 22, 2010

Before: Alex Kozinski, Chief Judge, Alfred T. Goodwin, Stephen Reinhardt, Pamela Ann Rymer, Andrew J. Kleinfeld, Ronald M. Gould, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta, and N. Randy Smith, Circuit Judges.

Opinion by Judge Kleinfeld;
Dissent by Judge Bea

COUNSEL

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Grant Habata (briefed), California Association of Realtors, Los Angeles, California, for amicus curiae California Association of Realtors.

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California, Legal Services of Northern California, Non-Profit Housing, Association of Northern California, R. Keith Traphagen, and Tenants Together.

OPINION

KLEINFELD, Circuit Judge:

We address the viability of a takings claim arising out of a rent control ordinance affecting mobile home parks.

I. Facts

In 1979, Santa Barbara County, California adopted a rent control ordinance for mobile homes.[1] Mobile homes have the peculiar characteristic of separating ownership of homes that are, as a practical matter, affixed to the land, from the land itself.[2] Be-

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1 Santa Barbara County, Cal., Ordinance 3, 122 (Oct. 22, 1979).

2 *See Yee v. City of Escondido:*

> The term "mobile home" is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved. A mobile home owner typically rents a plot of land, called a "pad," from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold

cause the owner of the mobile home cannot readily move it to get a lower rent, the owner of the land has the owner of the mobile home over a barrel. The Santa Barbara County rent control ordinance for mobile homes had as its stated purpose relieving "exorbitant rents exploiting" a shortage of housing and the high cost of moving mobile homes.[3] The rent

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[Footnote continued from previous page]

> in place, and the purchaser continues to rent the pad on which the mobile home is located.

503 U.S. 519, 523 (1992) (citation omitted).

[3] The first section of the ordinance provides the "purpose" of enacting it:

> A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who reside in rental housing. These conditions endanger the public health and welfare of the County of Santa Barbara. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobile home parks in the County of Santa Barbara. Because of such factors and the high cost of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the Board of Supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobile home park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by

control ordinance was amended in 1987.[4] The ordinance has a complex scheme for setting rents, limiting how fast they rise, and affording landlords a mechanism for disputing the limits.[5]

Eighteen years after the original rent control ordinance went into effect, and ten years after the amendment, the plaintiffs *Daniel* and Susan Guggenheim and Maureen H. Pierce (the Guggenheims) bought a mobile home park, "Ranch Mobile Estates," burdened by the ordinance.

The park, when the Guggenheims bought it in 1997, was in what California calls "unincorporated territory" in Santa Barbara County. Five years later, in 2002, the City of Goleta incorporated in territory including the Guggenheims' land. California law requires a newly incorporated city comprising

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[Footnote continued from previous page]

> imposing rent controls in mobilehome parks within the unincorporated area of the County of Santa Barbara.

Goleta, Cal., Mun. Code § 08.14.010; *see also* Santa Barbara County, Cal., Ordinance 3,122 § 1 (Oct. 22, 1979), codified at Santa Barbara County, Cal., Code § 11A-1

[4] Santa Clara County, Cal., Ordinance 3,678 (Dec. 21, 1987).

[5] The ordinance limits the ability of park owners to increase rent of existing tenants. Park owners may only do so once a year, or at the termination of a lease term. Goleta, Cal., Mun. Code §§ 08.14.070-080. The amount of the increase is determined through arbitration. Goleta, Cal., Mun. Code § 08.14.040. Park owners can automatically raise rent by 75% of the local consumer price index (a measure of inflation), and may seek additional increases for various reasons provided in the ordinance. *Id.* § 08.14.050. When a tenant sells the mobile home to a new tenant, the park owner may only increase the rent by 10%. *Id.* § 08.14.140.

previously unincorporated territory to adopt, as its first official act, an ordinance keeping all the county ordinances in effect for 120 days or until the new municipality changes them, whichever happens first.[6] Goleta did what was required on its first day of existence, February 1, 2002, so the county rent control ordinance for mobile home parks became the city rent control ordinance on the first day of the City's existence, as the City's very first official act. And on April 22, 2002, within the 120-day sunset period, the City of Goleta adopted the county code including the ordinance, this time without the statutory 120-day sunset period.[7] The parties have stipulated that there was a legal gap when the ordinance was not in effect, apparently referring to the hours between the City's coming into legal existence and the performance of the City's first official act on its first day. Those hours on the first day of Goleta's existence are the only time between 1979 and the present day, and the only time during the Guggenheims' ownership, when no rent control ordinance has burdened the Guggenheims' mobile home park.[8]

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[6] Cal. Gov't Code § 57376(a) ("If the newly incorporated city comprises territory formerly unincorporated, the city council shall, immediately following its organization and prior to performing any other official act, adopt an ordinance providing that all county ordinances previously applicable shall remain in full force and effect as city ordinances for a period of 120 days after incorporation, or until the city council has enacted ordinances superseding the county ordinances, whichever occurs first.").

[7] Goleta, Cal., Ordinance 02-17 (Apr. 22, 2002).

[8] We say there was a gap because the parties so stipulated, but we do not imply a construction of California law to that effect. The California statute says that the newly incorporated

That year, 2002, the Guggenheims sued the City claiming that the rent control ordinance was a taking of their property without compensation, and asserting numerous other claims.[9] They have limited their takings claim to a facial challenge, not an "as applied" challenge. They claim that it is the rent control ordinance itself, not its particularized application to their mobile home park or the regulatory process applied to their park, that has denied them their constitutional rights. The theory of the takings claim is that by locking in a rent below market rents, and allowing tenants to sell their mobile homes to buyers who will still enjoy the benefits of the controlled rent (albeit subject to upward adjustment[10]), the ordinance shifts much of the value of ownership of the land from the landlord to the tenant. The Guggenheims submitted an expert's report with the summary judgment papers explaining that rents for sites in their mobile home park would average about $13,000 a year without

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city must "immediately" and "prior to performing any other official act" adopt an ordinance maintaining the effectiveness of all county ordinances, so it may be that, were it not for the stipulation, there would be an arguable question whether there was any gap.

[9] These claims include a substantive due process claim, damages for the deprivation of constitutional rights, an equal protection claim, violations of the California state constitution, and a variety of other claims not at issue here. The federal constitutional claims are brought under 42 U.S.C. § 1983.

[10] Park owners can automatically raise rent by 75% of the local consumer price index (a measure of inflation), and may seek additional increases for various reasons provided in the ordinance. Goleta, Cal., Mun. Code § 08.14.050.

rent control, but average less than $3,300 with rent control, and that the tenants could sell their mobile homes for around an average of $14,000 without rent control, but because of rent control, the average mobile home in the park sells for roughly $120,000. Since the Guggenheims lost on summary judgment, we assume for purposes of decision that this is correct.

The case went through a complex procedural course, but the complexities are of no importance here. First the case in federal court was stayed pursuant to *Pullman*[11] abstention while the Guggenheims pursued claims in state court. They and the City settled the state case. Returning to federal court, the Guggenheims won summary judgment, and the City appealed. While the appeal was pending, the Supreme Court decided *Lingle v. Chevron U.S.A. Inc.*,[12] and the Guggenheims and the City agreed that *Lingle* so undermined the district court judgment that they stipulated to dismiss the appeal and they reopened the litigation in district court. This time the City won summary judgment, and the Guggenheims appeal. The district court observed that the Guggenheims "got exactly what they bargained for when they purchased the Park—a mobile-home park subject to a detailed rent-control ordinance." We reversed,[13] but de-

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[11] *See Railroad Comm. of Tex. v. Pullman Co.*, 312 U.S. 496, 501-02 (1941).

[12] 544 U.S. 528 (2005).

[13] *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009).

cided to rehear the case en banc,[14] and now vacate our earlier decision and affirm.

II. Analysis

We review a grant of summary judgment de novo.[15] The Guggenheims' challenge is to the 2002 City of Goleta ordinance adopting the county rent control ordinance, and its readoption within the 120-day period.

A. Jurisdiction

[1] The City does not dispute jurisdiction, but we raised the issues of standing and ripeness *sua sponte* in our panel decision.[16] The Guggenheims have claimed an injury in fact to themselves (deprivation of much of the value of their land), which is fairly traceable to Goleta's rent control ordinance, and is redressable by a decision in their favor, so they do indeed have standing to maintain their challenge to the 2002 ordinances.[17]

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[14] *Guggenheim v. City of Goleta*, 598 F.3d 1061 (9th Cir. 2010).

[15] *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001).

[16] *Guggenheim*, 582 F.3d at 1004 n. 4.

[17] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121-22 (9th Cir. 2009) (quoting *Lujan*); *see also Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1193 (9th Cir. 2008) (holding that a property owner must own the affected property at the time the land use regulation is enacted to have standing to bring a facial regulatory takings claim); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994), *overruled on other grounds by WMX Techs. Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (same).

They owned the land in 2002 when the City of Goleta promulgated the 2002 ordinances.

Ripeness is more complicated, because of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City.*[18] In *Williamson*, the Supreme Court imposed two ripeness requirements on federal takings claims. First, a regulatory takings claim is not ripe until the appropriate administrative agency has made a final decision on how the regulation will be applied to the property at issue.[19] That requirement has no application to this facial challenge. "Facial challenges are exempt from the first prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation.[20] Second, a property owner who sues for inverse condemnation, claiming that his property was taken without just compensation, generally must seek that compensation through the procedures provided by the state before bringing a federal suit.[21]

In *Yee v. City of Escondido*, another California mobile home rent control case, the Court held that although an "as applied" challenge would have been unripe because the park owner had not sought permission to increase rents from the administrative body established by the ordinance, the facial challenge by the park owners was indeed ripe, because it

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[18] 473 U.S. 172 (1985).

[19] *Id.* at 192-93; *see also Equity Lifestyle*, 548 F.3d at 1190.

[20] *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003).

[21] *Williamson*, 473 U.S. at 195; *Equity Lifestyle*, 548 F.3d at 1190.

did not depend on the extent to which they were deprived of the economic use of their property or the extent to which they were compensated.[22] Subsequently in *Suitum v. Tahoe Regional Planning Agency*, the Court described the *Williamson* ripeness requirements as "prudential" rather than jurisdictional in the context of regulatory takings case.[23] In *Adam Brothers Farming, Inc. v. County of Santa Barbara*, we held that we had discretion to waive the *Williamson* exhaustion requirement where the case raised only prudential ripeness concerns, and did so, assuming without deciding that the takings claim was ripe.[24] In so doing, we applied *McClung v. City of Sumner*.[25] In *McClung* we had also interpreted *Suitum* as describing *Williamson* ripeness as prudential rather than jurisdictional, and concluded that "we need not determine the exact contours of when takings claim ripeness is merely prudential and not jurisdictional."[26]

That is not to suggest that *Williamson* is dead. In *Ventura Mobilehome Communities Owners Association v. City of San Buenaventura*, we held that the only cognizable claim raised was an as applied challenge, so held that it was properly dismissed as unripe.[27] And in *Sinclair Oil Corp. v. County of Santa Barbara*, we held that while as applied challenges required *Williamson* exhaustion, facial challenges

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[22] 503 U.S. 519, 533-34 (1992).

[23] 520 U.S. 725, 733-34 (1997).

[24] 604 F.3d 1142, 1147-48 (9th Cir. 2010).

[25] 548 F.3d 1219 (9th Cir. 2008).

[26] *Id.* at 1224.

[27] 371 F.3d 1046, 1052-54 (9th Cir. 2004).

sometimes did and sometimes did not.[28] A complication that makes it especially difficult to determine the continuing viability of our ripeness precedents is that many involve "substantially advances legitimate state interests" claims under *Agins v. City of Tiburon*,[29] and *Agins* was overruled by *Lingle*.[30] Indeed, in the case before us, *Agins* was the law during state proceedings, and *Lingle* did not come down until the first appeal was pending in federal court. It may be that a claim (even a facial claim), alleging a regulatory taking based on the theory that an ordinance takes property without just compensation, is unripe until that property owner has sought compensation through such state proceedings as may be available. But under *Suitum* this ripeness requirement now appears to be prudential rather than jurisdictional.

[2] In this case, we assume without deciding that the claim is ripe, and exercise our discretion not to impose the prudential requirement of exhaustion in state court. Two factors persuade us to follow this course. First, we reject the Guggenheims' claim on the merits, so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation. Second, the Guggenheims did indeed litigate in state court, and they and the City of Goleta settled in state court. Unfortunately the law changed after their trip to state court, so they might well have proceeded differently there had they been there after *Lingle* came down, but it is

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[28] 96 F.3d 401, 406-07 (9th Cir. 1996).

[29] 447 U.S. 255, 260 (1980).

[30] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

hard to see any value in forcing a second trip on them.

B. *Penn Central* and *Palazzolo*

[3] The Guggenheims challenge only the 2002 City of Goleta ordinance, not the 1979 or 1987 County of Santa Barbara ordinances. The fundamental weakness of the dissent is its blending of the economic effects of all three ordinances, even though challenges to the first two have long been barred and are not asserted. There is a big problem with challenging as a taking the government's failure to repeal a long existing law. The County ordinances were both promulgated long before the Guggenheims bought their land, and the rent control regime created by the county ordinances limited the value of the land when the Guggenheims bought it. The Guggenheims assert no claim against the County of Santa Barbara, just the City of Goleta. They frame their challenge narrowly, solely as a facial challenge to the City of Goleta ordinance promulgated in 2002. And they argue that their facial challenge should be evaluated under *Penn Central Transportation Co. v. New York City*.[31] We assume, without deciding, that a facial challenge can be made under *Penn Central*.[32]

Palazzolo v. Rhode Island[33] is of no help to the Guggenheims. They do not have the problem that

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[31] 438 U.S. 104 (1977).

[32] *See Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 334 (2002) ("[I]f petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis.").

[33] 533 U.S. 604, 627-28 (2001).

Palazzolo solved. In *Palazzolo* the taking was from the first owner and the "as applied" lawsuit was by the second. The transfer was by operation of law, during the period when the owner was ripening the claim by exhausting state remedies.[34] One reason why these distinctions matter is that even though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation.

[4] *Palazzolo* holds that an owner who acquires title to property during the period required for an as applied regulatory taking to ripen (in that case during proceedings on applications to build on wetlands) is not necessarily barred from bringing the action when it ripens even though he did not own the property when the regulation first started to be applied to the property.[35] This difference matters because an as applied challenge necessarily addresses the period during which the administrative or judicial proceedings for relief occur, so justice may require that title

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[34] *Id.* at 614.

[35] *Id.* at 628 ("A challenge to a land use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

transfers during the ripening period not bar the action. By contrast, there is no such extended period applicable to a facial challenge, because the only time that matters is the time the ordinance was adopted.

[5] The Guggenheims, unlike the owner in *Palazzolo*, have owned the mobile home park at all relevant times. The Guggenheims owned during, before, and after adoption of the two City of Goleta ordinances they challenge, both upon incorporation and within the 120-day period. *Palazzolo* does not revive a challenge to the 1979 and 1987 county ordinances,[36] and the Guggenheims do not make one. Thus whatever wrongs the 1979 and 1987 county ordinances may have done to whoever owned the mobile home park then, those wrongs are not before us.

And the Guggenheims carefully limit their challenge to a facial one, not an as applied challenge. By so doing, they reserve the possibility of an as applied challenge if at some subsequent time the City of Goleta's arbitrator denies them a fair rent increase.[37] If the rent control scheme effects an unconstitutional taking when applied, the challenge will be to that application, not to the ordinance on its face, and the

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[36] *Daniel v. County of Santa Barbara*, 288 F.3d 375, 384 (9th Cir. 2002). We have also rejected the argument that *Palazzolo* "eliminat[es] any statute of limitations requirement." *Equity Lifestyle*, 548 F.3d at 1193 n.15.

[37] We do not address whether the limitation on the amount by which rents can increase and the provisions for arbitration of rent increases may work a taking, because that cannot be determined until these limitations are applied. That we reject the facial challenge has no bearing one way or the other on whether an as applied challenge might succeed.

time for the challenge will run from when the administrative action became final as opposed to when the ordinance was enacted. It is not as though an unconstitutional law becomes immunized from all challenges once limitations bar facial challenges to its enactment.

As we held in *Levald, Inc. v. City of Palm Desert*, "[i]n the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed."[38] Nor does it matter that a challenge might not have been worth making in 1979 or 1987 when property values were lower, but became worth making when the housing bubble inflated many prices. As *Levald* stated, "while the rising property values may be relevant to an as-applied challenge, they are not relevant to a claim that the very enactment of the statute effected a taking."[39]

[6] But this is not to say that passage of the county ordinances in 1979 and 1987 can be ignored. It is central. *Yee v. City of Escondido*[40] holds that a takings challenge to mobile home rent control ordinance materially similar to Goleta's should be analyzed as a regulatory taking under *Penn Central*, not a physical occupation amounting to a per se taking as in *Loretto v. Teleprompter Manhattan CATV Corp.*[41] *Lingle* explains *Penn Central* as identifying

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[38] 998 F.2d 680, 688 (9th Cir. 1993).

[39] *Id.*

[40] 503 U.S. 519, 532 (1992).

[41] 458 U.S. 419 (1982).

several factors, not a set formula, to determine whether a regulatory action is "functionally equivalent to the classic taking."[42] "Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[43] *Lingle* points out that the character of the government action may also be relevant,[44] but this cuts against the Guggenheims because the government action here is a continuation of an old ordinance. The case before us turns on the "primary" factor.

[7] That "primary factor," "the extent to which the regulation has interfered with distinct investment-backed expectations," is fatal to the Guggenheims' claim. We assume for purposes of discussion (since the Guggenheims' summary judgment evidence would so establish) that the rent control ordinance, unchanged since 1987, did indeed transfer about $10,000 a year in rent for the average mobile home owner from the landlord to the tenant, and that this has had the effect of raising the price of the average mobile home from $14,000 to $120,000. That had happened before the Guggenheims bought the mobile home park. Since the ordinance was a matter of public record, the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer.

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[42] *Lingle*, 544 U.S. at 539.

[43] *Id.* at 538-39 (internal editorial and quotation marks omitted).

[44] *Id.* at 539.

[8] They could have no "distinct investment-backed expectations" that they would obtain illegal amounts of rent. To "expect" can mean to anticipate or look forward to, but it can also mean "to consider probable or certain," and "distinct" means capable of being easily perceived, or characterized by individualizing qualities.[45] "Distinct investment-backed expectations" implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes. A landlord buys land burdened by leaseholds in order to acquire a stream of income from rents and the possibility of increased rents or resale value in the future. The stream already suffered a reduced flow when the Guggenheims bought it, so what they paid would reflect the flow that the law allowed. The Guggenheims might conceivably have paid a slight speculative premium over the value that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action. But that premium could be no more than a speculative possibility, not an "expectation." Speculative possibilities of windfalls do not amount to "distinct investment-backed expectations," unless they are shown to be probable enough materially to affect the price.[46] The

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[45] *Webster's Third New International Dictionary* 658, 799 (1981).

[46] The dissent suggests that any speculative possibility, including the speculative possibility that a long existing law might change, should be enough to give rise to a takings claim if that speculative possibility is cut off. Thus, under the dissent's approach, if a statute prohibiting some land use were converted into a state constitutional amendment, the identical language in the constitutional amendment would amount to a

idea, after all, of the constitutional protection we enjoy in the security of our property against confiscation is to protect the property we have, not the property we dream of getting. The Guggenheims bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had.

The Guggenheims and the City of Goleta stipulated that there was a period of time when their mobile home park was free of rent control. That was the period of hours after "organization" of the City of Goleta and, "prior to performing any other official act."[47] This period could not have given rise to a reasonable investment-backed expectation, because the Guggenheims had already made their investment years before, and even if they had bought the mobile home park during those few hours, they would have known that Goleta's first official act would, under controlling law, have to be adoption of the county's rent control ordinance.

The Guggenheims also argue that the 120-day period when the rent control ordinance would be

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taking, because it reduced the speculative possibility that the law might be repealed.

It is one thing to speculate that the value of your land might change based on market demand; it is another to gamble that a stable law may be repealed or nullified. While there is always some possibility that the law may change, and the dissent suggests that possibility may be especially great in California, that possibility ought generally to be deemed too slight to give rise to a takings claim when the law is reenacted rather than repealed.

[47] *See* Cal. Gov't Code § 57376(a).

terminated unless readopted gave them a reasonable expectation that it would not be readopted. This argument too fails to account for the fact that their investment had already been made, years before. And even if it had been made during the 120 days, it is not as though the ordinance was in limbo during that period. The rent control ordinance was the law. Though the city might choose to let the ordinance lapse instead of readopting it, that possibility was as speculative as the possibility that the city might end rent control after the 120-day period. This speculation is less than an expectation.

Lingle holds that *Penn Central*, though not establishing a set formula, identifies significant factors, "the economic effect on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred."[48] The character of the government action does not help the Guggenheims. The City of Goleta did not adjust the benefits and burdens of economic life, it left them as they had been for many years.

Whatever unfairness to the mobile home park owner might have been imposed by rent control, it was imposed long ago, on someone earlier in the Guggenheims' chain of title. The Guggenheims

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[48] *Lingle*, 544 U.S. at 538-39 (internal editorial and quotation marks omitted).

doubtless paid a lot less for the stream of income mostly blocked by the rent control law than they would have for an unblocked stream. The 2002 City of Goleta adoption by reference of the Santa Barbara County ordinance did not transfer wealth from them to their tenants. That transfer occurred in 1979 and 1987, from other landlords, and probably benefitting other tenants.

[9] The people who really do have investment-backed expectations that might be upset by changes in the rent control system are tenants who bought their mobile homes after rent control went into effect. Ending rent control would be a windfall to the Guggenheims, and a disaster for tenants who bought their mobile homes after rent control was imposed in the 70's and 80's. Tenants come and go, and even though rent control transfers wealth to "the tenants," after a while, it is likely to affect different tenants from those who benefitted from the transfer. The present tenants lost nothing on account of the City's reinstitution of the County ordinance. But they would lose, on average, over $100,000 each if the rent control ordinance were repealed. The tenants who purchased during the rent control regime have invested an average of over $100,000 each in reliance on the stability of government policy.[49] Leaving the

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[49] We do not imply that a change in government policy amounts to a taking from the beneficiaries. *See Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1403 (9th Cir. 1993) (holding that "[r]easonable expectations arising out of past policy but without a basis in cognizable property rights may be honored by prudent politicians, because to do otherwise might be unfair, or because volatility in government policy will reduce its effectiveness in inducing long term changes in behavior. But violation

ordinance in place impairs no investment-backed expectations of the Guggenheims, but nullifying it would destroy the value these tenants thought they were buying.

C. Equal Protection and Due Process Claims

The Guggenheims make two other arguments, that the ordinance denies them substantive due process because it does not assure them a fair return on their investment, and that it denies them equal protection of the law because it treats mobile home park owners differently from other landlords.

[10] Due process claims can succeed when a rent control ordinance fails to substantially further a legitimate government interest.[50] The dissent argues that this ordinance did not achieve its purpose because it fails to control the price of sublets. It is true that the rent control ordinance at issue here does not control the rental price of a mobile home for occupants such as subletters. It controls the rental price of the land on which the mobile home is situated. This is in keeping with the purpose of the ordinance, which is not just to lower rents, but to "alleviate the hardship" to mobile home owners caused by "the high cost of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and

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of such expectations cannot give rise to a Fifth Amendment claim.").

50 *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997).

the substantial investment of mobilehome owners in such homes."[51] The ordinance protects mobile home owners, not all renters. Such a purpose does not protect mobile home renters from all market increases in the value of occupancy. It protects owners of mobile homes from the leverage owners of the pads have, to collect a premium reflecting the cost of moving the mobile home on top of the market value of use of the land. This is a legitimate government purpose, related to but distinct from lowering housing prices for all renters.

[11] Whether the City of Goleta's economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or will undermine those purposes, is not for us to decide. We are a court, not a tenure committee, and are bound by precedent establishing that such laws do have a rational basis.[52] Students in Economics 101 have for many decades

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[51] Goleta, Cal., Mun. Code § 08.14.010.

[52] *See Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) ("we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare"); *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1194 (9th Cir. 2008) ("The Supreme Court and this Circuit have upheld rent control laws as rationally related to a *legitimate public purpose*."); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994), *overruled on other grounds by WMX Techs. Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) ("A generally applicable rent-control ordinance will survive a substantive due process challenge if it is 'designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances.' ").

learned that rent control causes the higher rents and scarcity it is meant to alleviate,[53] but the Due Process Clause does not empower courts to impose sound economic principles on political bodies.[54]

[12] The Guggenheims' equal protection theory is also foreclosed by precedent,[55] and would have no force even if it were not, because only a rational basis is needed for this ordinance, and mobile parks differ from most other property in the separation of ownership of the land from the improvements affixed to the land. It is possible that application of the ordinance by the arbitrator will violate substantive or procedural due process requirements, but that remains to be seen, if at all, in an as applied challenge to its application.

AFFIRMED.

BEA, Circuit Judge, dissenting, joined by KOZINSKI, Chief Judge, and IKUTA, Circuit Judge:

I must respectfully dissent for two reasons.

First, because the majority misapplies the Supreme Court's analysis of regulatory takings claims. It ignores two essential elements of that analysis, and fails to follow the Court's instructions on the one

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[53] *See, e.g.*, William J. Baumol & Alan S. Blinder, ECONOMICS: PRINCIPLES AND POLICY 64-67 (2d ed. 1982).

[54] *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

[55] *Equity Lifestyle*, 548 F.3d at 1195 (9th Cir. 2008) ("This equal protection challenge must be considered under rational basis review because mobilehome park owners are not a suspect class.").

element it uses to disqualify the claim. The majority impermissibly picks out only one of the three factors the Court has told us to consider in determining whether a regulation effects a taking under the *Penn Central* test—whether the claimant had "distinct investment-backed expectations"—and inexplicably disdains the other two. This converts a three-factor balancing test into a "one-strike-you're-out" checklist. Not content to rewrite one binding precedent, the majority ignores the Court's recent holding in *Palazzolo* that an investor can validly expect that a land control measure, in place when he invests, is not necessarily eternal and therefore does not disqualify his claim of regulatory taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

Second, because it decides the substantive due process and equal protection claims by citing rent control cases. But, the Goleta ordinance is not a rent control law for the simple reason that it is not designed to—nor does it—control rents. It does not just miss the mark because of unintended consequences or inefficient administration. Its very structure was designed and intended not to provide housing rent control, but to transfer wealth from mobile home park owners to one group of lucky tenants. The measure we deal with here is a wealth transfer, pure and simple, with none of the features of rent control thought legitimate governmental interests. As such, its enforcement violates due process and equal protection.

I. Background

Appellants Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce (collectively, the "Guggenheims"), appeal the district court's grant of summary judgment in favor of the City of Goleta. The

Guggenheims own the land on which mobile homes sit. In 2002, the City of Goleta adopted a mobile home rent control ordinance. The Ordinance capped the rate of annual rent the Guggenheims could charge for the mobile home lots, and provided for a maximum of 10% rent increases upon the sale of the mobile home to a new tenant. Importantly, the Ordinance provided no cap on the amount mobile home owners could charge when leasing or selling the actual mobile home.

The Guggenheims brought suit alleging the Ordinance constituted a regulatory taking, thus entitling them to just compensation under the Fifth and Fourteenth Amendments. The Guggenheims also alleged due process and equal protection claims. Although the Guggenheims presented evidence that the Ordinance effects a wealth transfer from the mobile home land owners to the lucky, "windfall tenants" who held tenancies at the time of the enactment of the Ordinance, and that the Ordinance is not written in such a way as to effect a legitimate state interest—such as providing affordable housing to low income people—the district court granted summary judgment against them.[1]

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[1] We review the district court's order granting summary judgment in favor of the City *de novo*. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). We "must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law." *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002).

II. Takings Clause

Claiming to apply the three-factor test from *Penn Central*, the en banc majority opinion holds as a matter of law that the Guggenheims cannot establish the mobile home rent control ordinance effects a regulatory taking of its property for public use within the meaning of the Fifth Amendment, as applied to Goleta through the Fourteenth Amendment. The majority's principal error is its finding, as a matter of law, that the Ordinance could not interfere with the Guggenheims' "distinct investment-backed expectations" of freeing their land from "rent control." Maj. Op. at 20434. The majority reaches this conclusion only by adopting a view of the law and of the economic effects of the Goleta ordinance that is static and provides no opportunity for change or innovation. While attractive for its simplicity, such stasis does not reflect the world in which we live, nor the teachings of the Court.

In *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), the Court set forth the three factors that must be considered in determining whether a regulation effects a taking: (1) the economic impact of the regulation on the claimant; (2) the character of the government's action; and (3) the extent to which the regulation interferes with the claimant's investment-backed expectations. *Id.* at 124. The majority opinion deals only with the last factor, as if *Penn Central* established a "one-strike-you're-out" checklist for knocking property owners out of court, rather than a three-factor balancing test in which each factor *must* be considered. No one factor is "talismanic," Justice O'Connor said in *Palazzolo* when she criticized the state supreme court for "elevating what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dis-

positive status.' " *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring). The extent of interference with investment-backed expectations instead "is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.' " *Id.* (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Since *Penn Central* requires all factors be considered, that is what I shall do. Each of these factors militates in favor of finding that Goleta's so-called rent control ordinance (the "Ordinance") effected a regulatory taking.

A. The Economic Impact of the Ordinance

> Primary among [the *Penn Central*] factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.

Lingle v. Chevron,. 544 U.S. 528, 538-39 (2005) (internal quotation marks omitted).[2]

The majority opinion settles on the factor of "distinct investment-backed expectations," but fails to provide any analysis of the general economic impact

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[2] In *Lingle*, an oil company brought suit under the Fifth and Fourteenth Amendments challenging a Hawaii statute which limited the rent oil companies could charge dealers to lease company-owned service stations. Applying *Agins v. City of Tiburon*, 447 U.S. 255 (1980)—in which the Supreme Court declared that government regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests—the District Court held that the rent cap effected a taking. The Ninth Circuit affirmed. The Supreme Court reversed and remanded, holding that *Agins*' "substantially advances" test is not a valid takings test. *Lingle*, 544 U.S. at 548.

of the Goleta Ordinance on the claimant.[3] Let's provide that analysis.

The Guggenheims presented evidence that the Ordinance deprives them of approximately 80% of the market value of their mobile home park land—nearly all of which value is effectively transferred to the original tenants by enactment of the Ordinance. The Ordinance limits the amount by which rents on the mobile home pads may be increased to 75% of the Consumer Price Index, plus an additional amount to pass through increased operating costs, capital expenses, and capital improvements. Ordinance §§ 11A-5, 11A-6. The Ordinance also contains a vacancy control provision, which limits to 10% the permissible rent increase on the mobile home pad when a mobile home unit changes ownership. *Id.* § 11A-14. The parties and the district court did not dispute that the Ordinance seriously impacted the value of the Guggenheims' property:

> During the time that [the Guggenheims] have owned the Park, housing costs in the

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[3] I am puzzled, but grateful, to learn what the majority thinks is the fundamental weakness of this dissent: "[the] blending of the economic effects on the Guggenheims of all three ordinances." Maj. Op. at 20431.

Puzzled, because there are no economic effects on the Guggenheims from the two previously-enacted ordinances: the Santa Barbara 1979 and 1987 ordinances. Since Goleta incorporated itself into a city in 2002, only the 2002 Goleta ordinance imposes price control on the land the Guggenheims rent out. Indeed, the majority acknowledges it is only the 2002 ordinance which the Guggenheims challenge. Maj. Op. at 20431.

Grateful, to learn that I need not worry about the economic effects of the Santa Barbara ordinance; neither do the Guggenheims.

> City have increased approximately 225%. Because of the rent-control ordinance, the rents charged by [the park owners] have not kept pace with this increase . . . existence of lower-than-market value rents has resulted in the ability of mobilehome owners to sell their homes at a significant premium [the "transfer premium"]. According to the analysis of [the Guggenheims'] expert, based on the sale of 64 mobile homes from January 15, 1999 through July 21, 2004, the premium amounted to, on average, 88% of the sale price. In other words, an average mobile home worth $12,000 would sell for approximately $100,000.

As outlined in the report by the Guggenheims' expert, Dr. Quigley[4], and accepted by the district court, the Ordinance required the Guggenheims to rent all Park mobile home pad spaces at approximately 20% of their market value.[5] The market price of a mobile home increases when the rent the homeowner pays for space in a mobile home park decreases. Dr. Quigley estimated that, on average, almost 90% of a mobile home's sale price represented the value of the lower rents set by the Ordinance, and this premium went into the pockets of the tenants incumbent at

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[4] Dr. Quigley is a professor of economics, business, and policy at the University of California, Berkeley. *See* Carl Mason & John M. Quigley, *The Curious Institution of Mobile Home Rent Control*, 16 J. Housing Econ. 189, 189 (2007).

[5] Of course, as the years go by, and if housing costs increase, this 80% disparity between market and regulated rents will increase and the magnitude of the Ordinance's economic impact will grow.

the time of the Ordinance's enactment, hereafter the "windfall tenants."

There is no authority for the proposition relied on by the district court that a taking has not occurred when the complaining party continues to receive some return on investment. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (finding that an exaction of 96% of the property's return on equity was severe enough to constitute a taking under *Penn Central*). The *Penn Central* test looks at the severity of the economic burden, and a finder of fact could easily determine that a loss of 80% of the market value of property is just such a severe economic burden, even though the property owner receives *some* return on investment. In *Penn Central*, the Court held that enforcement of a landmark preservation ordinance to bar construction of a fifty-story office building was not a regulatory taking because the restricted airspace rights could be transferred to other parcels owned by the litigant; the option of constructing an office building at those other locations reduced the economic impact of the regulation. *Penn Central*, 438 U.S. at 137. But the Guggenheims are not so positioned: (1) they have no other lots, and (2) if they had, there is no benefit under the Ordinance which they could transfer to such lots. Moreover, the *Penn Central* landmark ordinance was generally-applicable to all types of property owners and barred only expansions of existing uses.

Further, California imposes considerable obstacles to alternate uses of the mobile home park. To convert the park to any other use, the Guggenheims must obtain approval of their plan from the city council. Cal. Gov. Code § 66427.5(e). As part of the approval process, they must file a plan outlining the

new use to which the property will be put and detailing the impact of the conversion on existing residents, and also conduct a "survey of support of residents . . . . pursuant to a written ballot," the results of which must be submitted along with the application and may be taken into account by the city council when it votes on the conversion plan. *Id.* § 66427.5(b), (d); *see Colony Cove Props., LLC v. City of Carson*, 114 Cal. Rptr. 3d 822, 835 (Cal. Ct. App. 2010). Additionally, because the cost of the Ordinance is borne solely by mobile home park owners—and not lessors of other housing –its economic impact on those park owners is more severe than a broad-based housing regulation. This factor favors finding a "taking" has occurred.

B. Investment-Backed Expectations of All the Park Owners

The majority opinion holds that the determinative *Penn Central* factor must be the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations; and that factor "is fatal to the Guggenheims' claim." Maj. Op. at 20434. In addition to avoiding the question of how a single factor in a three-factor test could be "fatal" without consideration or balancing of the other factors,[6] this holding is incorrect for three reasons.

First, the majority opinion holds, as a matter of law, that the Guggenheims cannot have investment-backed expectations of freeing their land from the rent control ordinance because they knew the regulation was in effect when they purchased the mobile

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[6] Justice O'Connor made this precise point in her concurrence in *Palazzolo*, *supra* at p. 20443.

home park. This could be a logical conclusion to reach--but only were one to ignore (1) the instructions of the Supreme Court, (2) decades of political, legal, and economic developments, and (3) the actions of the Guggenheims.

First, the Supreme Court has specifically held that the fact claimants knew of a land-use regulation at the time they took title to their land does *not* bar them from challenging that regulation, nor from contending that the ordinance lessened the value of their land by interference with their investment-backed expectations.

> Were we to accept the State's rule [that appellants had no investment-backed expectations because the ordinance was enacted before they purchased the land], the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. *A State would be allowed, in effect, to put an expiration date on the Takings Clause.* This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 627 (emphasis added). In his concurrence, Justice Scalia was even more explicit in criticizing the methodology employed by the majority here:

> In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The 'investment-backed expectations' that the law will

> take into account *do not include the assumed validity of a restriction* that in fact deprives property of so much of its value as to be unconstitutional.

Id. at 637 (Scalia, J., concurring) (emphasis added) (internal citation omitted). The majority's dismissal of the Guggenheim's investment-backed expectations, on the basis that they knew what they were getting into, directly contravenes Supreme Court precedent and assumes the eternal validity, without reform, of the so-called rent control ordinance.[7] It

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[7] Not only does *Palazzolo* recognize the Guggenheims' ability to bring a takings claim on the basis of their own reasonable investment-backed expectations, but it also acknowledges the ability of a land owner to bring a regulatory takings action for a loss in value that was suffered by a previous land owner. As *Palazzolo* points out, the government is not absolved of its obligation to defend actions restricting land use, merely on account of a postenactment transfer of title. 533 U.S. at 627. A rule barring land owners from challenging ordinances that were enacted during a previous landowner's tenure, the Court explained, "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself." *Id.* Consequently, the panel majority's observation that any unfairness attributable to the rent control ordinance "was imposed long ago[ ] on someone earlier in the Guggenheims' chain of title," is unavailing. Maj. Op. at 20437. *Palazzolo* makes clear that to the extent a previous landowner had the right to bring a regulatory takings challenge against an ordinance enacted during its tenure, successive landowners enjoy the same right. 533 U.S. at 627. Thus, even though the ordinance at issue effected a wealth transfer from the previous land owner to tenants in 1979 and 1987, which wealth transfer is kept in place by the 2002 Goleta ordinance, the Guggenheims may challenge the ordinance and seek recovery on the basis of the previous land owner's loss. *Id.* That loss is passed on to the

does not come as a surprise the majority's stance on this subject comes without legal authority.

The majority opinion asserts that *Palazzolo* "is of no help to the Guggenheims," Maj. Op. at 20431, but one is puzzled by its attempts to distinguish *Palazzolo*. The majority notes that the claimant in *Palazzolo* challenged the land-use regulation as it was applied to him, whereas here, the Guggenheims bring a facial challenge to the Ordinance. *Id.* at 20431. So? *Penn Central* involved an as-applied challenge; but it gave us rules of general application as to what constitutes a regulatory taking.[8] Next, the majority points out the transfer in *Palazzolo* was by operation of law (the claimant, as controlling shareholder of the corporation which owned the land, acquired the property when the corporation dissolved), whereas the Guggenheims purchased the mobile home park on the open market. So? The plaintiff in *Palazzolo* acquired title after the challenged land-use restriction was enacted and nonetheless prevailed without claiming that he should be considered to have become the owner when his corporation bought the land before the restriction's enactment, on some theory of advantageous piercing of the corporate veil *cum* relation back. These "distinctions" are mere differences, no more significant than that the Palazzolo

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[Footnote continued from previous page]

Guggenheims as an incident of property ownership. In accounting terms, it is a transferable contingent asset.

[8] *See Lingle*, 544 U.S. at 539 (calling the *Penn Central* factors the "principal guidelines for resolving regulatory takings claims"); *see also Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1032-33 (9th Cir. 2000) (describing the facial challenge addressed in *Lingle*).

land was in Rhode Island[9] and the Guggenheim land was in California.

Tellingly, the majority opinion provides no justification or legal support for why these proposed distinctions matter. Why should the investment-backed expectations of a land owner bringing a facial challenge be analyzed differently from those of an as-applied claimant? If the *expectations* are valid and are expropriated, what does it matter as to their existence that they will be injured in all cases (facial challenge) or just in some (as-applied challenge)? Either they are valid expectations, or they aren't. Likewise, the majority opinion provides no justification, legal or otherwise, for limiting the broad language of *Palazzolo* to the type of transaction that vests title.

But this misprism of Supreme Court precedent is made worse by the majority opinion's failure to recognize specific evidence of the Guggenheims' investment-backed (after all, the Guggenheims invested money to buy the property) expectations. As the Court noted in *Palazzolo*, a court should analyze the claimant's investment-backed expectations as if the regulation at issue could be repealed at any time. *Id.* at 637. Here, the Guggenheims purchased the mobile home park with the apparent belief they could free the land from the Ordinance, either through administrative action, political lobbying, or court action. After buying the property in 1997, they applied for a variance from the zoning commission, which variance could exempt their land from the Ordi-

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[9] Where he was up against a more formidable and resourceful takings opponent: the State of Rhode Island and Providence Plantations. Here, the Guggenheims face the town of Goleta.

nance.[10] The application was denied. They subsequently instituted this court action to have the Ordinance declared facially unconstitutional under the Fifth Amendment.[11]

The majority opinion even acknowledges the possibility of rent control repeal or reform by conceding that "[t]he Guggenheims might conceivably have

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[10] Although the Guggenheims did not need to seek a land-use variance to bring their facial challenge to the Ordinance, *see Sinclair Oil Corp. v. Cnty. of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996), the fact that they applied for such a variance immediately after purchasing the mobile home park is objective evidence that they had at least some investment-backed expectations they could free the land from the Ordinance. Reference to such administrative action is made to strengthen that prong of the Guggenheims' regulatory taking claim, and should not suggest any uncertainty as to whether this is an as-applied or facial challenge; this is indisputably a facial challenge.

[11] The Guggenheims' complaint contains further description of their efforts to contest the validity of the rent control ordinance and prevent its application to their mobile home park.

> Prior to the incorporation of the City, Plaintiffs unsuccessfully attempted to meet with City officials-elect to discuss the City's adoption of the mobilehome rent control provisions of the Orindance [sic]. In addition, Plaintiffs caused to be sent to the City Attorney-elect, a proposed ordinance that stayed the City's enforcement and the effectiveness of the newly adopted Ordinance relating to the vacancy control provision of mobilehome rent control and specifically the limitation of the adjustment of rents upon the sale of a mobilehome, i.e., vacancy control. Plaintiffs applied to the City for relief from the vacancy control restriction in the Ordinance. . . . Defendant's City Council considered adoption of the proposed moratorium and rejected it.

Guggenheim Complaint at ¶¶ 6-7.

paid a speculative premium over the value that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action." Maj. Op. at 20435. But, the majority dismisses this contention as a "speculative possibility, not an 'expectation,'" *id.* at 20435, without any citation of authority as to why a "speculative possibility is not an expectation, nor why a judge, not a jury, should determine whether there was such an "expectation." The majority opinion flatly states (without a citation to any case, statute, or even a law review article) that "speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations,' unless they are shown to be probable enough materially to affect the price." *Id.* at 20435. However, this self-supporting, self-defining language ignores the actual dictionary definition of "speculate." As defined by Webster's New 20th Century Unabridged Dictionary (1979), one meaning of "speculate" is precisely "to buy or sell *land* hoping to take advantage of an *expected* rise or fall in price." (emphasis added). Having determined that they might be able to free their mobile home park from the Ordinance, the Guggenheims bought the land based on these investment-backed expectations—expectations which influenced the price they were willing to pay for the property as well as their expected rate of return on the investment.

The Guggenheims' beliefs regarding the possibility of freeing their land from the Ordinance were not self-indulgent delusions, or "starry eyed hope of winning the jackpot if the law changes," as the majority terms it. Maj. Op. at 20435. Their beliefs were at least plausible in light of contemporary legal, political, and academic thought. In the modern economic

marketplace, the spectre of legal uncertainty haunts every commercial transaction and influences each party's valuation of the assets involved. For example, the validity of a pharmaceutical company's patent will affect that company's value as a potential acquisition target. Legal uncertainty over rent control has been particularly marked in California. In 1989 the state amended its Mobilehome Residency Law to exempt all *new* construction from local control. Cal. Civ. Code § 798.45. Less than two years before the Guggenheims purchased their property, California had abolished vacancy control for rental apartments statewide. Costa-Hawkins Rental Housing Act, § 1, 1995 Cal. Legis. Serv. 331 (A.B. 1164) (West) (codified at Cal. Civ. Code § 1954.50-.53). In January 1999, Santa Monica reformed its strict rent control ordinance, repealing its operation as to any new tenants. Tierra Properties, *Santa Monica: A Case Study in Growth and Rent Control* (1999).

The Guggenheims and the prior owners of their mobile home park may have reasonably thought that the state would abolish rent control—or at least vacancy control—for mobile home parks. And the Guggenheims could reasonably retain those expectations today, as recent efforts to repeal rent control in California have garnered significant support. For example, a 2008 ballot proposition to phase out rent control won almost 40% of the votes cast. Patrick McGreevy, *Prop. 98 Backers Seek Eminent Domain Limits*, L.A. Times, June 5, 2008, at 1.

Moreover, mobile home rent control ordinances have been heavily criticized in academia as an inefficient method for providing affordable housing to low and middle-income households. *See, e.g.*, Mason & Quigley, 16 J. Housing Econ. at 192, 205 (concluding that "housing is no more "affordable" [to subsequent

tenants] afterwards than it was before the ordinance was adopted," and that "virtually all of the economic benefits from lower regulated rents are paid out annually to finance the higher sales prices commanded by those dwellings").

Given the instances of actual or attempted repeal and reform of rent control ordinances across the country, the particular scrutiny paid to the issue in California, and the criticism of mobile home rent control in the academic literature, the Guggenheims had a reasonable expectation—or at least, a trier of fact could reasonably find they had such an expectation—that they could free their land from the Ordinance either through the grant of a zoning variance, political action targeted toward repealing the regulation in its entirety, or court action to invalidate the law. This inference is supported by evidence presented to the district court that the Guggenheims pursued relief from the Ordinance through at least two of these avenues in the years following their purchase of the mobile home park. The majority readily *admits* that this investment-backed expectation could have materially affected the price the Guggenheims were willing to pay for the mobile home park. "The Guggenheims might conceivably have paid a slight speculative premium over the value that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action." Maj. Op. at 20435. At most, this concession establishes that the Guggenheims *did* in fact have investment-backed expectations of freeing the land from the Ordinance; at the very least, it raises a question of fact for the jury to decide.

Finally, the majority, perhaps sensing its vulnerability on the issue of investment-backed expecta-

tions, attempts to distract the reader by introducing an entirely irrelevant consideration into the analysis: the alleged investment-backed expectations of the mobile home *tenants*. Maj. Op. at 20437. The majority opinion paints a sympathetic portrait of subsequent tenants who purchased mobile homes at market rates, in reliance on the continued validity of the Ordinance. But, the *Penn Central* regulatory taking analysis does not apply to them for the simple reason that no government action took economic value from them or would take such value from them were the Goleta ordinance held invalid. The Takings Clause prohibits only takings, without compensation, by *government* action, not losses from the workings of the free market. *See Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1403 (9th Cir. 1993) ("Reasonable expectations arising out of past policy but without a basis in cognizable property rights . . . . cannot give rise to a [taking]."). *Moreover*, *Penn Central* does not contemplate any consideration of the expectations of other market players, or any balancing of the interests of various market players in determining whether the government has taken property. Its analysis is focused solely on the investment-backed expectations of the claimants, here, the Guggenheims.

In sum, the majority opinion ignores Supreme Court precedent by holding that a claimant cannot have investment-backed expectations if he purchases property with notice of an existing regulation, by assuming the eternal regnancy of a land-use regulation, and by introducing irrelevant considerations which tend only to confuse the regulatory taking analysis. Furthermore, the majority adopts a static and somewhat simplistic view of law, politics, and economics by failing to recognize that the Guggen-

heims had a reasonable expectation of freeing their land from the Ordinance through political or legal means, and by failing to acknowledge that this belief could influence the price they were willing to pay for the land.

The Guggenheims presented sufficient evidence to raise a triable issue of fact regarding their investment-backed expectations to survive a motion for summary judgment. The case should have gone to trial.

C. The Character of the Government's Action

The majority opinion also ignores the final *Penn Central* factor, the character of the governmental action, which likewise cuts in favor of the Guggenheims. In analyzing this factor, a court looks at the purpose of the regulation, the effect it has in practice, and the distribution and magnitude of the burdens and benefits it places on private citizens. *Penn Central*, 438 U.S. at 130-34.

The stated purpose of Goleta's mobile home rent control ordinance was to protect "owners and *occupiers* of mobile-homes from unreasonable rents" brought about by a shortage of housing and the high cost of moving mobile homes. Ordinance § 11A-1 (emphasis added). Rent control measures also have the claimed ancillary benefit of allowing stable communities to form. *See* Jay M. Zitter, *Validity, Construction, and Application of Inclusionary Zoning Ordinances and Programs*, 22 A.L.R.6th 295, § 13 (2007). However, as discussed below with regard to the substantive due process claim, this Ordinance does not serve its stated purposes because of the way it is structured and written. The Ordinance restricts only the amount the landowner can charge a tenant

for rental of the mobile home parcel; it does not limit the amount which that tenant, in turn, can demand for sale or lease of the mobile home to other owners or tenants. The designed structure and working of the ordinance amounts to nothing more than a wealth transfer from the landowner to the original tenant, and indisputably does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home.

The Ordinance unquestionably places a high burden on a few private property owners instead of apportioning the burden more broadly among the tax base. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("[The Takings Clause] was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *see also Lingle*, 544 U.S. at 542-43; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987). Similar laws concentrating the cost of affordable housing on a small group of property-owners have been found unconstitutional. In *Cienega Gardens*, developers of low-income apartments were able to secure low-interest, forty-year loans from private lenders because the Department of Housing and Urban Development provided the developers with mortgage insurance. *Cienega Gardens*, 331 F.3d at 1325. Two federal statutes eliminated the developers' contractual rights to prepay their forty-year mortgage loans after twenty-years. *Id.* at 1326-27. The purpose of the statutes was to prevent the developers from exiting the low-rent housing programs in which they were required to participate while carrying the loans, but not once they paid off the loans. *See id.* at 1323. But the statutes caused a 96% loss of return on equity for

the developers. *Id.* at 1343. The developers brought suit against the government, claiming that the federal statutes restricting their right to prepay their mortgage loans effected a regulatory taking under the Fifth Amendment.

The Federal Circuit, applying *Penn Central*, found that the character of the government action was to place the expense of low-income housing on a few private property owners (those who had previously participated in the federal loan program but now wanted to pay their way out), instead of distributing the expense among all taxpayers in the form of incentives for developers to construct more low-rent apartments. *Id.* at 1338-39.

Similarly, here it is undisputed that the Ordinance applies only to mobile home park owners. The district court found that the City did not impose such extreme costs for providing affordable housing on any other property owners in the City, except as a condition of new development. In contrast to the burden of renting all the low-rent housing property at an 80% discount, the burden on new developers was to make only 20% of their housing available at below-market rates. There is nothing in the record to suggest why the Federal Circuit's reasoning should not be applied to the facts of this case; substituting "Goleta" for "Congress":

> Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners. Congress' objective . . .—preserving low-income housing—and method—forcing some owners to keep accepting below-market

> rents—is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden.

331 F.3d at 1338-39. This analysis, ignored by the majority opinion, weighs heavily in favor of finding a regulatory taking under *Penn Central*.

D. Weighing the *Penn Central* Factors Shows the Guggenheims Suffered a Regulatory Taking.

The majority opinion errs in considering only one element of a three-factor, balancing test—investment-backed expectations—and making that element dispositive. It treats the factors as a requirements checklist, rather than a list of considerations to weigh, one against or with another. Further, it flouts the Supreme Court's holding in *Palazzolo* that a "postenactment transfer of title [does not] absolve the [government] of its obligation to defend" the restrictions a regulation imposes on property-owners. *Palazzolo*, 533 U.S. at 627. At a *minimum*, the case should be remanded for trial on the severity of the economic impact on the claimants, the existence of investment-backed expectations, and the character of the governmental action because these are at least mixed questions of fact and law on which reasonable triers of fact could find that there was a taking. The Guggenheims produced evidence from which a finder of fact could find that a taking had occurred: the Guggenheims bought the mobile home park with the reasonable expectation that they could free the land from the Ordinance either through a variance, repeal of the regulation, or through court action. They were forced to rent mobile homes at 20% of the current

market rate, and sit by as incumbent mobile home owners captured a transfer premium averaging approximately 90% of the sale price of their mobile homes. On summary judgment, drawing all reasonable inferences in favor of the non-moving party, the district court erred in holding, as a matter of law, that the Ordinance was not a taking. *See Ventura Packers, Inc.*, 305 F.3d at 916.

III. Substantive Due Process Claim

The Supreme Court in *Lingle* clarified the difference between a challenge to a rent control ordinance as a regulatory takings claim and as a substantive due process claim, and affirmed the independent vitality of both theories.

> [The Takings Clause] is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference. . . . Due process violations cannot be remedied under the Takings Clause, because if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Crown Point Develop., Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007) (quoting *Lingle*, 544 U.S. at 537).

The majority opinion summarily dismisses the Guggenheims' substantive due process claim by noting that while the Ordinance may not perfectly accomplish its stated purposes, this court is bound by precedent establishing that rent control ordinances

are rationally related to a legitimate state interest. Maj. Op. at 20439. The majority opinion even cites Justice Holmes's iconic language from *Lochner*: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* n.54. And the majority might be correct if this case involved a true rent control ordinance. But, at the very least, a rent control ordinance must control rents, and Goleta's ordinance does no such thing.

The stated purpose of the Ordinance was to protect "owners and occupiers of mobilehomes from unreasonable rents," with the hope that affordable housing would create a stable population. Ordinance § 11A-1. But, the Ordinance is so structured so that it cannot achieve its designated purpose. Instead of controlling the price of rental housing, the Ordinance restricts only the amount the landowner can charge for one component of the cost of rental housing: land rent. There are no limits on the amount the "windfall tenant" and his successors as tenants or owners can charge when he in turn sub-leases or sells the mobile home to future tenants; as the housing market improves (as it did between 1997 and 2002), he has every incentive to capture that transfer premium by leasing or selling the mobile home.[12] The district court found it undisputed that this transfer premium equaled approximately 90% of the current sale price of a mobile home in the Park. As soon as the "wind-

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[12] Nor can it be argued that the future effects of the Ordinance should not be considered in the due process analysis. By providing for a 10% rent increase each time a mobile home is sold, the drafters of the Ordinance clearly contemplated the future effect of the rent control ordinance on future tenants, and this fact broadens the temporal scope of this court's review.

fall tenant" leases or sells the mobile home at a premium, the stated purposes of the Ordinance are nullified: the lease or sale is at the market rate, and the turnover in tenants has already interrupted the stability of the population and the goal of "affordable" (non-market) housing.

Thus, the Ordinance does not effect rent control, but simply transfers wealth from a small group of land owners to a larger group of fortunate tenants. While the government has authority to tax or encumber citizens for the common good, it cannot violate individual rights merely to enrich a small, private interest group. As the Court held in *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 87 U.S. 655 (1874):

> To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law. . . .

Id. at 664. The burden of this wealth transfer is borne entirely by mobile park lot owners, whose property rights are taken from them based solely on the nature of their business. Owners of condominium complexes, houses, or apartment buildings are not regulated by the Ordinance, even though their rental rates will affect the overall housing market to a greater extent than mobile home owners. *See* Quigley, *supra*.

Our court has several times found a rent control ordinance that creates such windfalls for lucky tenants and does not lower prices to be unconstitutional under the theory that it failed "substantially [to] ad-

vance a legitimate state interest." *See Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 855-57 (9th Cir. 2004) (ordinance limiting the rent oil company could collect from gas station operators was unconstitutional because operators could sell their lease rights at a premium), *rev'd sub. nom. Lingle*, 544 U.S. at 545; *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997) (ordinance regulating condominium assessments that allowed condo sellers to capture value of the regulation by selling at a premium was unconstitutional). One panel went so far as to hold that "a [mobile home] rent control ordinance that does not on its face provide for a mechanism to prevent the capture of a premium is unconstitutional, *as a matter of law*, absent sufficient evidence of externalities rendering a premium unavailable." *Cashman v. City of Cotati*, 374 F.3d 887, 897 (9th Cir. 2004) (emphasis altered).

Of course, these were regulatory takings cases, and the Supreme Court in *Lingle* disapproved of the "substantially advances" theory as a means of bringing a *takings* claim. 544 U.S. at 540. But *Lingle* upheld the independent validity of substantive due process claims and held that ordinances creating a transfer premium might not advance a legitimate government interest. The Court indicated that the "substantially advances" test was a way to bring substantive due process claims:

> The 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so

> arbitrary or irrational that it runs afoul of the Due Process Clause

Id. at 542; *see also Crown Point Dev., Inc.*, 506 F.3d at 856.

Also puzzling is the majority's assertion the Ordinance meets the legitimate purpose of alleviating the hardship to owners in the "costs of moving" mobile homes from the Goleta pads. Maj. Op. at 20439. Surely, the costs of moving a mobile home, from forklift to flatbed to "wide load" flags fluttering down the road to a new site, are the same if the mobile home is moved from a rent controlled lot or from a market controlled lot.

But perhaps what the majority means as the "costs of moving" is the increased land rent the mobile home owner may have to pay at the new location. What the majority overlooks, however, is that—unless the mobile home owner is one of the lucky original "windfall" tenants—the price he paid for his mobile home was jacked up by the present value of the difference between Goleta rent controlled land (lower) and market price rental land (higher). *See* discussion of Prof. Quigley's report, *supra* at p. 20445. If the present value of the difference between rent controlled and market land rentals is correctly reckoned in the market price of the mobile home, the only additional "costs of moving" to be incurred are indeed the costs of permits, trucking, possible damage to the unit, etc. But those costs would be incurred regardless whether the mobile home owners were moving from a rent controlled or a market rate lot. Thus, just as the Ordinance does not control rents—a point on which the majority agrees, Maj. Op. at 20438-39—it does not protect mobile

home owners from the "costs of moving," properly reckoned.

The Guggenheims do not base their substantive due process claim on Economics 101 or Herbert Spencer. *See* Maj. Op. at 20439 & n.54. To the contrary: the Guggenheims presented *undisputed* evidence that the Ordinance—by design—creates transfer premiums which increase the sublet rental or sale price of mobile homes. Such transfer premiums raise the eventual price to a Goleta tenant or buyer so that notwithstanding the Goleta-mandated lower regulated land rent he must pay, the combined cost of his land rent and mobile home sublease or purchase approximates the total housing price for similar mobile home use on unregulated land rentals outside of Goleta.

This evidence creates a genuine question as to whether the Ordinance is so ineffective at serving its stated public purpose of "providing affordable (low-cost) housing" that it is not rationally related to a legitimate state interest. Despite the great deference owed to legislative acts which do not implicate a fundamental right or suspect classification, Justice Holmes's quote from *Lochner* is not a talisman which protects all government regulations from examination and review, regardless of their structural integrity or effectiveness.

IV. Equal Protection Claim

The Guggenheims also argue that the Ordinance violates the Equal Protection Clause because it singles out mobile home park owners, as opposed to other sorts of housing providers, to bear the burden of an affordable housing program. This court has previously held that a mobile home rent control ordinance does not per se violate the Equal Protection

Clause because it is rationally related to the legitimate public interest of promoting affordable housing. *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1195 (9th Cir. 2008). *Equity Lifestyle* held that this is true even if the statute singles out mobile home owners such as the Guggenheims, does not increase the amount of available affordable housing, and "serve[s] the sole purpose of transferring the value of [the park owner's] property to a select private group of tenants." *Id.* at 1193. Such a naked transfer of wealth between two private actors, based solely on the manner in which individuals choose to use their land, violates the Equal Protection Clause. *Equity Lifestyle* should have been overruled by this en banc panel to bring our Equal Protection analysis into line with the Supreme Court's views as to takings and substantive due process.[13] As we are an en banc court, we are not bound by the "law of the circuit" rule of *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

We should reverse the district court's finding that there has been no compensable taking and no

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[13] *Pennell v. City of San Jose*, 485 U.S. 1, 13-14 (1988), which held the rent control ordinance at issue in that case was rationally related to a legitimate state interest is not contrary to our reasoning because *Pennell* involved a true rent control ordinance of rental apartments. The old tenants in that case had no power to charge the new tenants a premium over the rent controlled amount. Thus, the rent control ordinance was effective in carrying out the goal of providing affordable housing. Again, if our case involved a true rent control ordinance that was designed to be effective in attaining its goals, I would not dissent from the majority's conclusion that the Ordinance does not violate substantive due process or equal protection.

due process or equal protection violation, and remand for a trial on the merits.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL GUGGENHEIM;
SUSAN GUGGENHEIM;
MAUREEN H. PIERCE,
Plaintiffs-Appellants,

v.

CITY OF GOLETA, a
municipal corporation,
Defendant-Appellee.

No. 06-56306

D.C. No.
CV-02-02478-FMC

OPINION

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Argued and Submitted
April 7, 2008—Pasadena, California

Filed September 28, 2009

Before: Alfred T. Goodwin, Andrew J. Kleinfeld, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Bybee;
Dissent by Judge Kleinfeld

COUNSEL

Mark D. Alpert, Robert S. Coldren (argued), and C. William Dahlin, Santa Ana, California, for the plaintiffs-appellants.

Julie Hayward Biggs and Amy E. Morgan (argued), Los Angeles, California, for defendant-appellee.

OPINION

BYBEE, Circuit Judge:

Daniel Guggenheim and others bring a facial challenge to the City of Goleta's mobile home rent control ordinance. Guggenheim argues that the ordinance, which effects a transfer of nearly 90 percent of the property value from mobile home park owners to mobile home tenants, constitutes a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). We have fielded such challenges before, but have never reached the merits of the takings claim. *See, e.g., Equity Lifestyle Props., Inc. v. County of San Luis Obispo* ("*Equity Lifestyle*"), 548 F.3d 1184, 1190 n. 11 (9th Cir. 2008); *Carson Harbor Vill. Ltd., v. City of Carson*, 37 F.3d 468, 475-77 (9th Cir. 1994), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686-89 (9th Cir. 1993); *Sierra Lake Reserve v. City of Rocklin*, 938

F.2d 951, 955 (9th Cir. 1991), *vacated*, 506 U.S. 802 (1992).

To determine whether a taking has occurred we must decide several issues. We must first determine whether the mobile home park owners have standing to bring this case. Additionally, we must consider whether this case is ripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). If so, then we must determine whether the city ordinance constitutes a regulatory taking under *Penn Central*. We also address challenges to the ordinance under the Due Process and Equal Protection Clauses.

The district court did not address either the standing or ripeness questions due to the unusual procedural history of the case, but implicitly found the case was properly brought. The district court found that no taking had occurred. For the reasons explained below, we agree with the district court that this case is properly brought and ripe for decision, but we disagree with the district court on the merits of the takings claim. Because we find that a taking has occurred, we reverse and remand to the district court to determine what compensation is due. We affirm the district court's judgment on the due process and equal protection claims.

I

A

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, *see Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897), provides that "private property [shall not] be taken for public use, without just compensation." The Takings Clause "does not prohibit the taking of private property, but

instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The Takings Clause was drafted so as "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315. The Takings Clause "'bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

To determine whether a mobile-home rent control ordinance constitutes a taking under the Constitution, we must first understand some unique characteristics of mobile homes. "The fact that these homes can be moved does not mean that they do move." JOHN STEINBECK, TRAVELS WITH CHARLEY: IN SEARCH OF AMERICA 96 (Penguin Books 1986) (1962). As described by the Supreme Court:

> The term "mobile home" is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved .... A mobile home owner typically rents a plot of land, called a "pad," from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often

> invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

Yee v. City of Escondido, 503 U.S. 519, 523 (1992) (citation omitted).

The County of Santa Barbara, California (the "County"), first enacted its Rent Control Ordinance (the "RCO") in 1979, and amended it in 1987. In 2002, the City of Goleta incorporated within the County. As required by California law, the new City of Goleta immediately adopted by reference the County's code in its entirety, including the RCO, as its provisional new code. *See* CAL. GOV'T CODE § 57376 (2008); City of Goleta Ordinance No. 02-01. About two months later, the City readopted by reference most provisions of the County code, including the RCO, as permanent city ordinances. City of Goleta Ordinance No. 02-17.

The statement of "Purpose" in the RCO has remained unchanged since the RCO was first passed by the County in 1979. The purpose was to prevent mobile home park owners from charging exorbitant rents to exploit local housing shortages and the fact that mobile home owners could not easily move their homes:

> A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who

> reside in rental housing . . . . Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobile home parks in the County of Santa Barbara. Because of such factors and the high cost of moving mobilehomes, . . . the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobile home park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs.

RCO § 11A-1.[1]

The RCO limits any increases in mobile home rents on an annual basis to 75 percent of the increase in the local Consumer Price Index ("CPI"). RCO §§ 11A-5(a)(2), 11A-5(a)(3), 11A-5(g). This increase is referred to as the "automatic increase." Mobile home park owners may also increase the rent by an additional amount to pass through increased operating costs, capital expenses, and capital improvements. This increase is referred to as the "discretionary increase." RCO § 11A-5(f)(1); 11A-6. The RCO sets out an arbitration process by which park owners must

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[1] Because the City of Goleta adopted the RCO "by reference," the authoritative source of the RCO is found in the County code. *See* City of Goleta Ordinance No. 02-17 (adopting most provisions of the County code "by reference" and stating that "[w]henever 'County' or 'County of Santa Barbara' is used in the County Code . . . it shall mean the City of Goleta."). A copy of Santa Barbara's current version of the RCO may be found at http://www.bpcnet.com/codes/stbarb/, by clicking on the link titled "Chapter 11 Mobilehomes." The citations in this opinion refer to the RCO as amended in 1987.

work with the mobile home owners and an arbitrator to determine the total amount of the permissible rent increase for each year. RCO §§ 11A-4, 11A-5. The arbitrator must follow a complicated formula to determine the amount of any increase in excess of the automatic increase:

> (1) First, grant one-half of the automatic increase to management as a just and reasonable return on investment. The arbitrator shall have no discretion to award additional amounts as a just and reasonable return on investment.
>
> (2) Next, grant one-half of the automatic increase to management to cover increased operating costs. The arbitrator shall have no discretion to award less than this amount for operating costs.
>
> (3) Next, add an amount to cover operating costs, if any, in excess of one-half of the automatic increase. The arbitrator shall have discretion to add such amounts as are justified by the evidence and otherwise permitted by this chapter.
>
> (4) Next, add an amount to cover new capital expenses. Where one-half of the automatic increase is more than the actual increase in operating costs for the year then ending, the arbitrator shall offset the difference against any increases for new capital expenses.
>
> (5) Next, add an amount to cover old capital expenses. Where one-half of the automatic increase is more than the actual increase in operating costs for the year then ending, the arbitrator shall offset the differ-

> ence against any increase for old capital expenses unless such difference has already been used to offset an increase for a new capital expense or another old capital expense . . . .
>
> (6) Finally, add an amount to cover increased costs for capital improvements, if any. The arbitrator shall have discretion to add such amount as is justified by the evidence and otherwise permitted by this ordinance.

RCO § 11A-5(I). The RCO also contains a vacancy control provision, which limits the permissible rent increase to 10 percent when a unit is sold. RCO § 11A-14. In sum, the RCO mandates that a "just and reasonable return" for the park owners must always be less than or equal to exactly one half of 75 percent of the annual increase of the CPI. The RCO permits park owners to go to arbitration to pass through additional costs, but such costs must be recaptured without *any* return on investment. In the event a tenant sells his or her unit, the park owners are entitled to a one-time rent increase of 10 percent; subsequent increases are capped by the regular formula.

B

1

Appellants Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce (collectively, the "Park Owners") purchased the Ranch Mobile Estates mobile home park ("the Park") in 1997, at which time the Park was located in an unincorporated part of the County. At the time of the purchase, therefore, the Park was subject to the County's RCO as amended in 1987. When the City incorporated in

2002, the Park fell within the new city's jurisdiction. Because the City adopted the RCO by reference, the Park continued to be subject to the RCO after the City incorporated.

A month after the City incorporated, the Park Owners brought suit in federal court, alleging only facial challenges to the RCO. The Park Owners claimed, *inter alia*, violations of the Takings Clause, the Due Process Clause, and the Equal Protection Clause. The Park Owners also raised complex state law claims, claiming the City failed to follow proper procedures required by the California Government Code when it enacted the RCO. Apparently, the Park Owners initiated the lawsuit in 2002, even though they purchased the Park in 1997, because they claimed the City adopted the RCO without any "hearings or studies or investigations as to whether the County's Ordinance was needed or appropriate for the City." The Park Owners' complaint represented that they "had attempted to meet with the City officials-elect to discuss the City's potential adoption of" the County's RCO, and had "applied to the City for relief from the potential vacancy control restriction in the County Ordinance[,] but it was nevertheless adopted without any change by Defendant City." The Park Owners complained that when it adopted the RCO, "[t]he City failed to review the County Code or make any findings on whether there was a purpose or need" for the RCO in the current real estate market.

The district court stayed the viable federal claims under the *Pullman* doctrine, to permit the resolution of certain complex state law claims that might "moot or narrow the constitutional questions." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). The parties set-

tled their state law claims after litigating in Santa Barbara Superior Court, and then returned to federal court for a second time.[2]

2

Back in federal court, the Park Owners moved for partial summary judgment. The district court reviewed the undisputed facts and the affidavits and documents proffered by the parties. The court found that during the time the Park Owners owned the Park, housing costs in the City increased approximately 225 percent. Because of the RCO, the rents charged by the Park Owners did not keep pace with this increase. The below-market rents resulted in the ability of mobile home owners to sell their homes at a significant premium (the transfer premium). The district court found, based on a report provided by the Park Owners, that the transfer premium amounted to, on average, 88 percent of the sale price. "In other words," the district court found, "an average mobile home worth $12,000 would sell for approximately $100,000." The district court found that "the uncontroverted facts . . . establish the existence of a premium," and that even "[t]he City has acknowledged the existence of such a premium."

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[2] Of particular relevance to this appeal, the parties stipulated that there was a gap in time when no rent control ordinance was in effect over the Park. This stipulated fact was necessary to support the timeliness of the Park Owners' facial challenges to the RCO. The statute of limitations for a facial takings claim begins to run with the passage of the challenged law. *See Equity Lifestyle*, 548 F.3d at 1193. The supposed "gap in time" clarified that the City's RCO, for purposes of this litigation, was enacted in 2002. Thus, the Park Owners' suit, initiated in 2002, was timely.

The district court granted summary judgment on the takings claim in favor of the Park Owners on October 29, 2004. At the time the district court made its determination, the law in the Ninth Circuit was that a government regulation effected a taking if such regulation did not "substantially advance" legitimate state interests. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997) (holding that a condominium rent control ordinance that permits incumbent condominium owners to capitalize the net present value of reduced land rent will not substantially further its goal of creating affordable owner-occupied housing and thus constitutes a taking). The district court found it undisputed that the RCO effected a one-time wealth transfer from the Park Owners to the incumbent tenants, and that the RCO failed to substantially advance its stated purpose of providing affordable housing. The court found, therefore, that the RCO was an unconstitutional regulatory taking and the Park Owners were entitled to just compensation. The City timely appealed.

On May 23, 2005, while the case was on appeal, the Supreme Court decided *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). *Lingle* repudiated the "substantially advances" theory upon which the Park Owners had prevailed.[3] In light of this development,

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[3] The Court found that the "substantially advances" theory "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Lingle*, 544 U.S. at 540. *See generally Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 854-56 (9th Cir. 2007) (discussing *Lingle*'s reasoning and its impact on Takings Clause jurisprudence).

the parties stipulated to vacate the district court's judgment and return for what would now be their fourth round of litigation before a trial court.

3

After some renewed pre-trial litigation, the district court issued a series of summary judgment rulings in which it found in favor of the City on each of the Park Owners' remaining constitutional claims. On April 5, 2006, the district court denied the Park Owners' motion for partial summary judgment, finding that the Park Owners were not entitled to judgment as a matter of law as to whether the RCO constituted a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The court reviewed both parties' expert reports and found that the evidence as to the economic impact of the regulation was "mixed":

> Although [the Park Owners] have enjoyed a rate of return comparable to other real estate investments, [the Park Owners'] evidence tends to suggest that they would have earned more—perhaps much more—in the absence of the RCO.

The district court also denied the Park Owners' motion for summary judgment on their substantive due process and equal protection claims. The parties continued to prepare for trial—designating experts, agreeing to witness and exhibit lists, and filing motions *in limine*.

On July 27, 2006, the district court *sua sponte* issued an Order to Show Cause why the court should not, on its own motion, enter summary judgment in favor of the City. On September 6, 2006, after reviewing the parties' responses, the district court entered summary judgment in favor of the City on all of

the Park Owners' remaining causes of action. The court stated:

> Because this is a facial challenge to the ordinance in question, the evidence [the Park Owners] seek to present at trial vis[-]a[-]vis their Fifth Amendment [T]akings [C]lause claim is irrelevant. To facially attack the ordinance as an uncompensated "taking," [the Park Owners] must demonstrate that the mere enactment of the ordinance constitutes a taking.

The court then complained that the Park Owners had "impermissibly attempted to convert this action, de facto, into an as-applied challenge." The district court did not, however, identify which evidence it found "irrelevant" or "impermissible" in a facial takings claim. The district court also did not make explicit whether it incorporated its April 5 analysis of the Park Owners' *Penn Central* claim into its final judgment or whether it entered final judgment solely on the ground the Park Owners were barred from presenting evidence in a facial challenge. The Park Owners appealed in a timely manner.

II

This case has already been litigated through three full rounds at the trial level, including one in state court and two in federal court, producing one victory for the Park Owners, one for the City, and one tie (the settlement). Accordingly, it may come as a surprise that before we reach the merits of the Park Owners' appeal, we must consider whether the plaintiffs have standing to bring this case and whether this case is ripe for decision.

A

Under Article III, our power to adjudicate is limited to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. Accordingly, we are not authorized to decide a dispute "merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Rather, we must first determine whether a litigant has "standing" to bring suit in the federal forum for his alleged injury.[4] *See id.* at 471-72.

The Supreme Court has defined standing generally as "the question of . . . whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). We have recognized that a plaintiff must at minimum present a suit with "three elements" in order to satisfy us that this question can be answered affirmatively. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121-22 (9th Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff must first "have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (inter-

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[4] Although neither party addressed standing, "[b]ecause standing is a necessary element of federal jurisdiction, we raise the issue of standing *sua sponte*." *Carson Harbor Village*, 37 F.3d at 475.

nal quotations omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal quotation marks and alterations omitted). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561.

There is no question that the latter two elements of the standing inquiry are satisfied by the Park Owners. The Park Owners submitted a comprehensive analysis of the effects of the RCO which demonstrated that the RCO reduced the rents the Park Owners could collect by approximately $10,000 per year. *See infra* n.14. The link between the Park Owners' injury and the RCO is thus not "tenuous" but "fairly traceable" to the City's action. *See Tyler v. Cuomo*, 236 F.3d 1124, 1132-33 (9th Cir. 2000). If we were to determine that the RCO effected a taking, the Park Owners are due compensation for their loss—thus, it is not "merely speculative . . . that the injury will be redressed by a favorable decision." *Id.* at 1133.

[1] Nevertheless, we must still determine whether the Park Owners have an "actual injury"—that they have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). This "actual injury" requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but

in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472.

Although in this case there is every indication that the Park Owners (and the City, who never raised the question of standing) believed they had a personal stake in the outcome of the controversy—indeed, both parties litigated the merits of the claim several times over—we have previously denied standing to similar plaintiffs bringing facial takings challenges against rent control ordinances. *See Equity Lifestyle*, 548 F.3d at 1193; *Carson Harbor Village*, 37 F.3d at 475-76. In *Carson Harbor Village*, we held that a mobile home park owner who had purchased the regulated property *after* the allegedly unconstitutional ordinance was passed did not have standing to state a facial takings claim. 37 F.3d at 476. We reasoned that the park owner's claims "necessarily rest on the premise that an interest in property was taken from all mobile home property owners upon the statute's enactment." *Id.* Accordingly, because "[i]n a facial taking, the harm is singular and discrete, occurring only at the time the statute is enacted . . . . [b]ecause [the plaintiff] did not own the property when the statutes were enacted and when the alleged facial takings occurred, it has incurred no injury entitling it to assert a facial claim." *Id.* Likewise, in *Equity Lifestyle*, we dismissed a mobile home park owner's facial takings claim because "the injury is treated as having occurred to the previous landowner" who occupied the property at the moment the allegedly offending statute was enacted. 548 F.3d at 1193.

We have also noted, without deciding the issue, that the Supreme Court's opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), calls into ques-

tion the principle that a subsequent property owner does not have standing to assert a facial challenge to a statutory enactment thought to effectuate a taking. *See Equity Lifestyle*, 548 F.3d at 1190 n.11, 1193 n.15. In *Palazzolo*, the Court rejected the notion that only the landowner at the time of the statute's enactment could assert a valid takings claim under *Penn Central*. *See* 533 U.S. at 630 ("[A takings claim] is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."). The Court remarked that "[a] law does not become a background principal for subsequent owners by enactment itself." *Id*; *see Equity Lifestyle*, 548 F.3d at 1190 n.11. These statements, as we have previously noted, cast doubt on *Carson Harbor Village*'s rationale for denying standing to subsequent purchasers—they indicate that a subsequent purchaser may have a stake in a facial suit against the regulation. *See id.*

[2] In this case, however, even if the rule of *Carson Harbor Village* survives *Palazzolo*, the Park Owners satisfy Article III's case or controversy requirements. Although the Park Owners purchased the burdened property in 1997, eighteen years after the County first passed the RCO and ten years after it was amended, the City adopted the RCO in 2002, after the Park Owners were in possession of the Park. Additionally, the parties stipulated that there was some time period between the City's incorporation and the City's adoption of the RCO in which no rent control ordinance was in effect. *See supra* n.2. Thus, assuming that *Carson Harbor Village* is still good law, even though the Park Owners might not have standing to challenge the County's use of the RCO, they are precisely the sort of plaintiffs *Carson Harbor Village* envisioned bringing a facial challenge

to the City's RCO. *See Carson Harbor Village*, 37 F.3d at 476 ("[F]acial [takings] claims necessarily rest on the premise that an interest in property was taken from all mobile home property owners upon the statute's enactment."). We therefore find that the Park Owners have standing to bring their takings claim.

B

[3] "[A] takings claim must [also] . . . comply with timeliness requirements. It must be filed neither too early (unripe) nor too late (barred by a statute of limitations)." *Equity Lifestyle*, 548 F.3d at 1190. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985), the Supreme Court held that a takings claim is not ripe until the property owner has attempted to obtain just compensation for the loss of his or her property through the procedures provided by the state for obtaining such compensation and been denied. *Id.* at 195. *Williamson* also set forth an additional hurdle, applicable only to as-applied challenges: the property owner must have received a "final decision" from the appropriate regulatory entity as to how the challenged law will be applied to the property at issue. *Id.* at 192-93. The latter requirement is not applicable here because the Park Owners have raised only a facial challenge. "Facial challenges are exempt from the ["final decision"] prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (citation omitted).

The district court found that this case was ripe, although on a slightly different theory. When the Park Owners filed suit in federal district court, they had approached the City of Goleta to ask for relief from the RCO, but had not brought an inverse condemnation suit in a California court. Thus, the Park Owners had failed to satisfy *Williamson*'s first prong, that the property owners exhaust state remedies. The district court found that the Park Owners' facial challenges were ripe nevertheless because of a narrow exception to the *Williamson* requirement. At the time the Park Owners brought this suit, a claim that a law constituted a taking because it did not "substantially advance" the purpose of that law was exempt from the *Williamson* requirement. *See Yee*, 503 U.S. at 533-34. The Court had created the exception for challenges on the "substantially advances" theory because "this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated." *Id.* at 534 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987)). Thus, the Park Owners were permitted to litigate their claims through federal court; they eventually prevailed on the "substantially advances" theory.

When the Supreme Court repudiated the "substantially advances" theory in *Lingle*, presumably it closed this theory's loophole in the *Williamson* requirements. *See San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 345-46 & n.25 (2005) (stating that *Williamson* did not reach "substantially advances" claims, but noting that after *Lingle*, such claims were foreclosed). Therefore, once *Lingle* was decided and the parties stipulated to vacate the first judgment of the district court and re-

turn to that court to litigate the Park Owners' remaining claims, the ripeness of these claims was unclear.

After returning to district court, the City failed to raise the issue of ripeness to the district court's attention, and instead proceeded to defend its RCO on the merits. The district court, too, declined to raise the issue of ripeness and proceeded to grant summary judgment in favor of the City on the merits. In the parties' filings on appeal to this court, neither party raised the issue of ripeness. Unsure of whether this case was ripe, and unsure of whether we had a duty to raise the issue ourselves, we asked the parties to discuss ripeness at oral argument. In addition to presenting the legal arguments we discuss below, the parties both represented that the Park Owners had not brought an inverse condemnation action in a California court. *See generally Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (1997).

1

In order to determine whether the Park Owners's claims are ripe under *Williamson*, and, if so, whether they have satisfied the *Williamson* requirements, we must look closely at *Williamson* and its progeny.

As the Park Owners contended at oral argument, *Williamson* has come under scrutiny since it was decided. Counsel for the Park Owners accused *Williamson* of having effectively "closed the federal courthouse doors" to litigants seeking to vindicate an important right embedded in the Fifth Amendment of the United States Constitution. He was not the first to level this accusation. In fact, the Supreme Court has already acknowledged that the practical effect of *Williamson* is that plaintiffs alleging viola-

tions of the Takings Clause will almost never have the opportunity to litigate their federal claims in federal court. *See San Remo Hotel*, 545 U.S. at 337-41, 344-48. *Williamson* requires plaintiffs to go first to state court, where they are likely to generate a ruling on the merits of their takings claim from the state court that in turn will have preclusive effect should they opt to return to federal court. *Id.*

Chief Justice Rehnquist, joined by three members of the Court, wrote specially in *San Remo Hotel* to explain why he believed *Williamson* may have been wrongly decided. *See id.* at 348, 352 (Rehnquist, C.J., concurring in the judgment) ("I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic."). The concurring Justices stated:

> *Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee. The basic principle that state courts are competent to enforce federal rights and to adjudicate federal takings claims is sound, and would apply to any number of federal claims. But that principle does not explain why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive.

Id. at 351 (citations omitted). Nevertheless, unless and until the Court decides to reconsider this issue, *Williamson* is the law by which we are bound.[5]

2

Although the Court has so far declined to reconsider *Williamson*, it has with some frequency continued to clarify and modify the doctrine. These modifications provide the framework by which we must determine the application of *Williamson* to the unusual case before us.

Most importantly, the Court has explicitly held that the *Williamson* requirements are merely pru-

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[5] "We are free to muse, however," *Clement v. City of Glendale*, 518 F.3d 1090, 1093 n.4 (9th Cir. 2008), as to an additional reason why *Williamson* may be incorrect. *See San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring in the judgment) (suggesting that it might be appropriate to revisit this issue if the "court below has addressed the correctness of *Williamson*"). *Williamson* reasoned that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation," and therefore, until the property owner has actually sought and been denied just compensation in the state court, the Fifth Amendment has not been violated. *Williamson*, 473 U.S. at 194. With this analysis, the Court read an exhaustion requirement into the definition of the constitutional injury. With all due respect, we do not think the Constitution requires this result. "[P]rivate property [is] taken for public use, without just compensation," U.S. CONST. amend. V, at the very moment the government takes the private property and fails to compensate the property owner. The property owner who files an unsuccessful inverse condemnation claim in state court and then somehow manages to have the claim heard in federal court is owed just compensation from the date of the government's action taking the property without compensating the owner, not the date on which the property owner received the final decision in state court denying the taking claim.

dential requirements. In *Lucas v. South Carolina Coastal Council*, the Court stated that the *Williamson* requirements were prudential: "*Lucas* has properly alleged Article III injury in fact in this case," and the fact that he had not satisfied *Williamson* "goes only to the prudential 'ripeness' of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here." 505 U.S. 1003, 1012-13 (1992). Similarly, in *Suitum v. Tahoe Regional Planning Agency*, the Court distinguished constitutional ripeness under Article III and prudential ripeness, and stated that *Williamson* ripeness is grounded exclusively in prudential considerations. 520 U.S. 725, 733-34 & n.7 (1997) (stating that it was undisputed that the case "presents a genuine 'case or controversy' sufficient to satisfy Article III," and considering only whether the plaintiffs case satisfied the prudential requirements). The Court itself called the *Williamson* requirements "prudential ripeness principles." *Id.*; *see also San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring in the judgment) (noting that the Court may have purported to "divin[e]" the *Williamson* requirements from the text of the Fifth Amendment but later had held them to be merely prudential).

The Court's clarification that *Williamson* created mere "prudential requirements" is crucial to our analysis for two reasons. First, if *Williamson* were grounded in Article III ripeness, we would be required to raise the issue *sua sponte* even though neither party raised it. *See Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997) ("An appellate court has a duty to consider *sua sponte* whether an issue is ripe for review, in order to ensure that proper subject matter jurisdiction exists to hear the case."). Because *Williamson* has been held to be merely a set of

prudential, exhaustion-type requirements, although we asked the parties for their views, we were not obligated to raise the issue. *Compare Day v. McDonough*, 547 U.S. 198, 202, 205, 209-10 (2006) (holding that AEDPA's statute of limitations was akin to an exhaustion requirement, that it could be waived by the state, and that "district courts are permitted, but not obligated, to consider, *sua sponte*" the issue), *with John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 752-54 (2008) (holding that the statute of limitations for cases in the United States Court of Federal Claims, 28 U.S.C. § 2501, is akin to a jurisdictional requirement, and therefore the Court of Appeals for the Federal Circuit was obligated to raise the timeliness issue despite the government's waiver of it). As *Lucas* clearly illustrates, some takings cases will have undisputably satisfied Article III jurisdictional requirements but will have failed to satisfy the *Williamson* prudential requirements. The Court has held that where constitutional ripeness requirements have otherwise been met, a court may consider whether to excuse the failure to satisfy prudential requirements without concern of exceeding its Article III jurisdiction. *Lucas*, 505 U.S. at 1012-14 (citing practical concerns to justify reaching the merits).

[4] Second, because *Williamson* exhaustion is prudential only, the requirement may be waived or forfeited. *See Day*, 547 U.S. at 202, 205 (holding that the state may waive objections to AEDPA's statute of limitations, which, like an exhaustion requirement, is nonjurisdictional); *Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, 65 F.3d 1472, 1482 (9th Cir. 1995) (holding that "Medicare's administrative exhaustion requirements are jurisdictional in nature" but may be waived by the Secretary

expressly or "involuntarily, through a mistake or omission"); *LaDuke v. Nelson*, 762 F.2d 1318, 1323 & n.4 (9th Cir. 1985) (distinguishing between Article III and prudential standing requirements, noting that one prudential requirement was waived by the plaintiff, and finding the requirement did not bar the suit because the underlying justifications for that prudential limitation were absent); *see also Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 117-25 (2d Cir. 2007) (holding that issue exhaustion in the context of immigration petitions is not "truly 'jurisdictional' in the Article III sense" but rather a prudential administrative exhaustion requirement, and therefore that the defense may be waived and that the court has discretion to review issues not exhausted where it deems the underlying prudential concerns have been satisfied (citation omitted)). Here, in its post-*Lingle* filings before the district court and its filings on appeal to this court, the City of Goleta forfeited the claim that this case was not ripe for review by failing to raise it.

We note that there is tension in our decisions on this point. As we recently observed, "[a]lthough the Supreme Court has described takings claims ripeness as addressing prudential rather than Article III considerations . . . our Circuit has analyzed takings claim ripeness as raising both prudential and Article III considerations." *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008) (citing cases). In particular, there is tension between language in three of our decisions. In *Hacienda Valley Mobile Estates v. Morgan Hill*, 353 F.3d 651 (9th Cir. 2003), we concluded that "[b]ecause . . . *Hacienda*'s claim is not ripe, we affirm the district court's dismissal for lack of subject matter jurisdiction." *Id.* at 661. In that case, we did not otherwise discuss whether *William-*

son embraced both jurisdictional and prudential requirements, nor did we discuss the impact on *Williamson* of *Palazzolo*, *Suitum*, or *Lucas*. By contrast, in *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), we recited that "[i]f a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed," and we then determined that the landowners' takings claim was "not ripe" and "premature." *Id.* at 1160, 1161-62 (quotation marks and citation omitted), 1162. Although the claim was not ripe under *Williamson*, we reached the merits anyway and upheld the constitutionality of the ordinance. *Id.* at 1166. We thus treated the ripeness inquiry as prudential only. In our latest effort in this area, *McClung v. City of Sumner*, we noted the conflict in our cases and then treated the jurisdictional concerns as an aspect of Article III and the prudential concerns as the sole inquiry under *Williamson*. 548 F.3d at 1224 ("[W]e do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the takings claim is ripe in order to address the merits of the appeal.").[6]

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[6] Much of the confusion stems from dicta in our decision in *Southern Pacific Transportation Company v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990), where we noted in the context of a takings claim that "ripeness is more than a mere procedural question; it is determinative of jurisdiction" and remarked that the lack of ripeness "may be raised sua sponte if not raised by the parties." *Id.* at 502. *Southern Pacific* was decided previous to the Supreme Court's decisions in *Palazzolo*, *Suitum*, and *Lucas*, and this language is inconsistent with those decisions.

[5] In light of the Supreme Court's unmistakable pronouncements, we think that *McClung* and *Richardson* represent the more considered view. In this case, as in *McClung*, there is no question that the Park Owners have satisfied Article III requirements, including ripeness. We have held, in another context, that "the [Article III] ripeness inquiry contains *both* a constitutional and a prudential component." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (emphasis added); *see also Colwell*, 558 F.3d at 1123 ("[R]ipeness doctrine reflects both constitutional and prudential considerations."). We stated in *Thomas* that the Article III component of the ripeness inquiry "can be characterized as standing on a timeline," and that the real question in cases presenting questions of Article III ripeness is whether "there exists a constitutional 'case or controversy,' [and] that the issues presented are 'definite and concrete, not hypothetical and abstract.'" 220 F.3d at 1138, 1139 (quotations omitted). *See also Colwell*, 558 F.3d at 1123. Where it is clear that a takings plaintiff has standing—including "standing on a timeline"—and has "presented a genuine case or controversy sufficient to satisfy Article III," the further questions under *Williamson* of whether a plaintiff has "received a final decision regarding the application of the challenged regulations to the property at issue" and whether the he has "sought compensation through the procedures the State has provided for doing so" are merely "prudential ripeness requirements." *Suitum*, 520 U.S. at 733 n.7, 734 (internal alterations and quotation marks omitted). In this case, then, where the Park Owners have obviously presented a live case or controversy, *see supra* Part IIA, it is clear that any further questions under *Williamson* do not raise the

spectre of an Article III jurisdictional bar. *See Colwell*, 558 F.3d at 1123 (noting that because "[p]laintiffs' stake in the legal issues is concrete rather than abstract . . . the ripeness requirement of Article III is satisfied.").

3

Having reviewed the *Williamson* jurisprudence, we find that we may reach the merits of the Park Owners' takings claim. For the following reasons, "we do not think it prudent to apply that prudential requirement here." *Lucas*, 505 U.S. at 1013.

First, the City forfeited its claim that the case was not ripe for decision. Because the *Williamson* requirements are "prudential ripeness principles," *Suitum*, 520 U.S. at 733-34, and not Article III jurisdictional limitations, they may be waived or forfeited. After *Lingle* prompted the parties to stipulate to vacate the initial judgment of the district court and return for litigation at the trial level, the City had the burden to raise any remaining prudential concerns under *Williamson*. Instead, the City was content to continue litigating the claims on the merits. The City expressed no doubts that the record in the case was fit for a decision by a federal court. Moreover, the City was not concerned that the Park Owners' failure to initiate an inverse condemnation action in state court left any doubt as to whether the state had yet compelled the City to provide just compensation to the Park Owners. The City did not, in fact, mention ripeness at all until prompted by an order from this court to discuss the issue at oral argument.

At oral argument, the City acknowledged that as part of its appeal it had not even considered whether *Williamson* prevented us from reaching the Park

Owners' takings claims, and first came to the position that *Williamson* did so after receiving our order to be prepared to discuss *Williamson* at oral argument. The City argued to us that the case was not ripe under *Williamson*, and offered as supporting authority our opinions in *Equity Lifestyle Properties*[7] and *Carson Harbor Village*. Neither of these cases, nor in fact *Williamson* itself, appeared in the City's appellate brief.[8] In answer to our questions, the City expressly conceded that the *Williamson* requirements were merely prudential and not Article III jurisdictional requirements. The City argued that its claim was not waived because we could still exercise our discretion to find that the case was not ripe because of prudential considerations. The City's argument lacks merit, however. Because the *Williamson* requirements are merely prudential, the claims can be waived. The fact that we may exercise our discretion to find the claims unripe does not change the fact that the claims are waivable, and that in this case the City forfeited them.[9]

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[7] *Equity Lifestyle Props., Inc. v. County of San Luis Obispo* ("*Equity Lifestyle Properties*"), 505 F.3d 860 (9th Cir. 2007), *withdrawn and superseded on denial of rehearing by Equity Lifestyle*, 548 F.3d at 1184.

[8] The opinion in *Equity Lifestyle Properties* was not filed until September 17, 2007, and so could not have been included in the City's brief, initially filed March 12, 2007. However, *Williamson* and *Carson Harbor Village* had been decided several years earlier, as had numerous other *Williamson* cases, and *Equity Lifestyle Properties* could have been offered in a letter under FED. R. APP. P. 28(j).

[9] Moreover, *Equity Lifestyle* and *Carson Harbor Village* do not control our decision here. Those cases used the general principles of *Williamson* and found the property owners' as-

The fact that the City forfeited its ripeness claim has an additional, evidentiary implication. It confirms our belief that the record in this case is eminently ripe for review. *Williamson* could have resurfaced at the time that *Lingle* implicitly foreclosed the Park Owners' exception from *Williamson* based on the "substantially advances" theory. It did not. It would certainly seem counter-intuitive to us now to think that a case that had at that point already been litigated through three rounds—two in federal court and one in state court—could suddenly become "unripe." The fact that the City failed to notice this as well suggests to us that any concerns meant to be protected by *Williamson* had been sufficiently protected by the unusual and lengthy development of the case. *See Palazzolo*, 533 U.S. at 622 (holding that the purpose of *Williamson* is to develop the record in order to understand the effect of the challenged regulation).

Second, we find that the Park Owners have substantially satisfied the *Williamson* requirements. "[I]t is important to bear in mind the purpose" that the *Williamson* requirement serves. *Id.* at 622. *Williamson* held that a facial takings claim could not be

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[Footnote continued from previous page]

applied takings claims had not been properly exhausted. *See Equity Lifestyle*, 548 F.3d at 1190-92; *Carson Harbor Village*, 37 F.3d at 474-75. Neither case dealt with the application of *Williamson* in a case where the government failed to raise the ripeness issue on appeal after the district court implicitly found the takings claims ripe. Similarly, neither case presented the question of whether we could find that the property owners had substantially satisfied the prudential concerns embodied in *Williamson* after three rounds of trial-level litigation in state and federal court.

ripe until the property owner has "unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 195. Here, the Park Owners did, in fact, take this case to state court. Although they did not file a formal inverse condemnation proceeding, they litigated and settled several state law issues relevant to the alleged taking with the City, including issues necessary to establish the timeliness of the takings claim. They then returned to federal court, without having been compensated for the taking of their property. There is no doubt that they have now unsuccessfully attempted to obtain just compensation through procedures provided by the State. *See id.*

Moreover, there is just no question that the case is fit for review. The parties have now litigated this case through three full rounds at the trial court level. There is no doubt that there is sufficient evidence in the record to "determine whether [the] regulation goes too far.' " *Palazzolo*, 533 U.S. at 622 (quoting *MacDonald* 477 U.S. at 348). In addition, as we discuss below, it is *undisputed* that: (1) the RCO has caused a significant loss of value to the Park Owners' property; and (2) neither the City of Goleta nor the State of California has ever offered compensation for this loss in value. To the contrary, the City has litigated against providing compensation continuously since 2002.

[6] Given the Park Owners' substantial compliance with the *Williamson* requirements, and the City's forfeiture of the ripeness claim, we believe that *Lucas* compels us to reach the merits of this case. "In these circumstances, we think it would not accord with sound process to insist that [the Park Owners] pursue the late-created" need to file a formal inverse

condemnation action in state court "before [their] takings claim can be considered ripe." *Lucas*, 505 U.S. at 1012. Just like *Lucas*, the Park Owners "[have] properly alleged Article III injury in fact in this case." *Id.* Any failure to have filed a formal inverse condemnation claim while already in state court "goes only to the prudential 'ripeness' of [the Park Owners'] challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here." *Id.* at 1013.

III

[7] Having held that we may reach the merits of the Park Owners' takings claims, we now turn to those claims.[10] As we have recently summarized, the Supreme Court has identified three basic categories of regulatory takings claims:

> [1] where government requires an owner to suffer a permanent physical invasion of property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); [2] where a regulation deprives an owner of all economically beneficial use of property, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and [3] where the *Penn Central* factors are met, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

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[10] We review a district court's ruling on summary judgment that no regulatory taking has occurred *de novo*. *Gammoh v. City of La Habra*, 395 F.3d 1114, 1122 (9th Cir. 2005). "We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Id.* (internal quotation and citation omitted).

Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007); *see Lingle*, 544 U.S. at 538. On appeal, the Park Owners raise only a facial challenge under *Penn Central*.

As described in *Lingle*,

> The Court in *Penn Central* acknowledged that it had hitherto been unable to develop any set formula for evaluating regulatory takings claims, but identified several factors that have particular significance. Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations. In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.

544 U.S. at 538-39 (internal quotation marks and citations omitted). We must first address each factor in turn, and then weigh the factors together, in what has famously been described as an "essentially ad-hoc, factual inquir[y]." *Penn Central*, 438 U.S. at 124. Before we can apply the *Penn Central* factors, however, we must consider the viability of a facial

challenge under *Penn Central*, and determine what facts we may consider when engaging in *Penn Central*'s ad-hoc factual inquiry.

A

The Park Owners have brought only a facial challenge to the RCO under *Penn Central*—they have not brought a corollary as-applied claim. Unlike an as-applied challenge, which asserts that a statute or regulation "by its own terms, infringe[s] constitutional freedoms in the circumstances of the particular case," *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972), a facial challenge alleges that the statute or regulation is unconstitutional in the abstract: that "no set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The Park Owners' decision to refrain from an as-applied challenge has two important consequences. First, as noted above, the decision exempts the Park Owners from the "final decision" prong of *Williamson*. *See Hacienda Valley Mobile Estates*, 353 F.3d at 655 ("Facial challenges are exempt from the ["final decision"] prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation."). Second, the Park Owners' decision to cast their *Penn Central* claim as a facial challenge places limits on the types of evidence that can be considered in adjudicating the claim. "In facial takings claims, our inquiry is limited to 'whether the mere enactment of the [regulation] constitutes a taking.' " *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000) (quoting *Agins*, 447 U.S. at 260); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). More

specifically, in a facial challenge "we look only to the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances." *Tahoe–Sierra*, 216 F.3d at 773 (internal quotation marks and citation omitted).

For this reason, the Supreme Court has noted that property owners bringing a facial takings challenge "face an uphill battle." *Suitum*, 520 U.S. at 736 n.10; *see Keystone*, 480 U.S. at 495. The fact that the Park Owners have characterized their facial challenge under *Penn Central* creates further complications. In a typical *Penn Central* claim, the court must consider factors that will usually not be found in the text of the statute, such as the economic impact on the claimant and the claimant's investment-backed expectations. Nevertheless, when adjudicating a facial challenge, the court must be careful not to simply look at "the effect of the application of the regulation in specific circumstances." *Tahoe–Sierra*, 216 F.3d at 773. The Park Owner's facial *Penn Central* claim requires us to address this apparent paradox: we must confront the question of whether a facial challenge under *Penn Central* is actually a viable legal claim; and if we determine that it is, we must then consider what evidence the Park Owners may present to prove their claim.

1

In the district court's summary judgment ruling of April 5, 2006, the court reviewed the record and engaged in a detailed *Penn Central* analysis. Each party had proffered an expert report in support of its position: the Park Owners proffered a report by Dr.

John M. Quigley,[11] and the City responded with a report by Mr. William Thomsen.[12] In its April ruling, although the district court did not rely on the detailed figures presented in either report, the district court did credit the core findings of each report (which we discuss *infra*). The district court found in favor of the City under *Penn Central*. Subsequently, the district court issued another summary judgment ruling on September 6, 2006, in which it purported to address the Park Owners' remaining claims. The district court then reaffirmed its ruling that the Park Owners had not prevailed under *Penn Central*. The district court's ruling was ambiguous, however, as to the basis for its decision. The court was unclear as to whether it was simply re-incorporating and reaffirming the *Penn Central* analysis applied in its April ruling, or whether it now based its ruling on the new ground that the Park Owners were precluded from presenting any of the evidence the court had relied on in April because the Park Owners brought only a facial challenge. The district court stated that the evidence the Park Owners sought to present "at trial" was "irrelevant" to a facial challenge, and complained that the Park Owners had "impermissibly attempted to convert this action, de facto, into an as-applied challenge." Because of the necessarily "ad

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[11] Dr. Quigley is a professor of economics, business, and policy at the University of California, Berkeley and serves as the Director of the Berkeley Program on Housing and Urban Policy. He served as President and Director of the American Real Estate and Urban Economics Association and has been a member of the National Academy of Sciences/National Research Council Committee on National Urban Policy.

[12] Mr. Thomsen is an MBA/CFA with the accounting firm of Grobstein, Horwath & Company, LLP.

hoc" nature of a *Penn Central* challenge, if the district court was adopting a rule that a property owner may present no evidence of the effect of a regulation on his property in a facial challenge, the court would essentially be adopting the rule that there is no such thing as a facial challenge under *Penn Central*.

Similarly, the City's position to our court on the meaning of a facial *Penn Central* challenge is ambiguous. The City has never argued that a facial challenge under *Penn Central* is not a viable legal claim. On the contrary, the City devoted much of its briefing and oral argument to defending the district court's April ruling on the Park Owners' *Penn Central* facial challenge, including the court's reliance on the core conclusions of the two parties' expert reports. In defending the conclusion of the district court on appeal, the City argues:

> [T]he district court concluded that absent the Ordinance, Park Owners would have achieved higher rates of return. This conclusion credits Park Owners' economic evidence and essentially agreed with Park Owners that the Ordinance had an economic impact on their business operation. It is difficult to imagine how the court's analysis and conclusion regarding the Ordinance's economic impact can be found lacking.

Elsewhere in its brief, however, the City complains that the Park Owners have introduced so much evidence as to try to turn a facial challenge into an as-applied challenge. The City does not point out which evidence is proper and which is impermissible in a facial challenge.

[8] Both logic and Supreme Court precedent support our conclusion that a facial challenge under

Penn Central must exist as a viable legal claim. Certainly it is apparent that a facial challenge is easier to mount under either *Loretto* or *Lucas*. It is far easier to prove that a regulation effects a physical invasion or that it denies an owner of all economically viable use of his property without considering evidence beyond the face of the regulation than it is to demonstrate that the regulation's effect satisfies the multifactor test of *Penn Central*. However, we have recently described the *Loretto* and *Lucas* tests as categorical "exceptions to the application of the regulatory takings test" as set forth in *Penn Central*. *Scheehle v. Justices of the Sup.Ct. of Ariz.*, 508 F.3d 887, 894 (9th Cir. 2007); *see Lingle*, 544 U.S. at 538 ("Outside these two relatively narrow categories . . . , regulatory takings challenges are governed by the standards set forth in *Penn Central*."). In fact, the Supreme Court has emphasized that *per se* takings claims are disfavored, whereas *Penn Central* claims are preferred. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 339, 342 (2002). It would seem incongruous indeed if only the disfavored exceptions to *Penn Central* could be brought as facial challenges, where a claim under the general rule of *Penn Central* could not.

[9] Supreme Court precedent also demonstrates the viability of a facial challenge under *Penn Central*. In *Keystone*, the Court emphasized the difficulty of prevailing on a facial challenge under *Penn Central*, and ultimately concluded that the mere enactment of the challenged statute did not effect a taking. *See Keystone*, 480 U.S. at 493-99. The Court's ruling implicitly recognizes that a facial *Penn Central* challenge is feasible. Moreover, in *Keystone*, the Court considered the limited evidence that the property owners had proffered, including the actual tonnage of

coal that the challenged statutes prevented the owners from removing, and the percentage of total coal in the mine that the restricted tonnage represented. *See id.* at 496-99 & n.24. The Court found that the property owners's facial challenge under *Penn Central* failed because the evidence the property owners provided was insufficient to demonstrate economic harm in any significant amount. *Id.* Thus, the Court found against the property owners not because the Court was not permitted to consider the evidence provided, but rather because the property owners' evidence did not show that the mere enactment of the statute amounted to a taking.[13] *Keystone* suggests that a facial *Penn Central* challenge is difficult, but viable. Similarly, in *Connolly v. Pension Benefit Guaranty Corp.*, the Court considered and rejected a facial *Penn Central* challenge to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980. 475 U.S. 211, 213, 224-28 (1986); *see also Tahoe-Sierra*, 535 U.S. at 321 (holding that the property owners' facial takings claim should have been brought under *Penn Central*); *Hodel*, 452 U.S. at 294-97 (ruling on a facial challenge under *Penn Central*). *Keystone* and *Connolly* demonstrate that a facial challenge under *Penn Central*

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[13] To be precise, in *Keystone*, the property owners expressly appealed only a facial challenge because they wanted to avoid the expense of producing the detailed evidence they believed would be necessary to mount an as-applied challenge. *See Keystone*, 480 U.S. at 493-94. Thus, the issue be fore the Supreme Court was not how much evidence a property owner may produce in a facial challenge, it was how little evidence the property owner could produce and still prevail in a facial challenge. The Court found the property owners had not produced enough. *See id.* at 494-502.

may be difficult, but the mere fact that *Penn Central* requires an ad-hoc multi-factor balancing test does not bar a facial challenge.

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The fact that the Court's precedents approve of a facial challenge under *Penn Central* requires us to consider what kinds of evidence beyond the text of the challenged regulation the reviewing court may consider. A facial challenge seeks to prove that "the 'mere enactment' of the [regulation] constitutes a taking." *Keystone*, 480 U.S. at 495 (quoting *Hodel*, 452 U.S. at 295). Property owners "thus face an uphill battle in making a facial attack on [a regulation] as a taking." *Id.* at 495. In reviewing a facial challenge under the Takings Clause, we "look only to the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances." *Tahoe-Sierra*, 216 F.3d at 773 (quotation marks omitted). In a takings case, however, we are cognizant that the text of the regulation itself will rarely describe the actual economic effect on property owners in concrete terms. Thus, the very nature of a takings inquiry would seem to require that we consider some evidence outside of the text of the statute. *See id.* at 781 n.24 (discussing the tension between the demands of a facial challenge and the necessity of demonstrating the economic impact of the regulation in a takings claim, and suggesting that there are still open questions as to what kinds of information may be considered in a facial takings claim); *Garneau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998) (evaluating a facial regulatory takings claim, and stating that plaintiffs have the burden of "introducing evidence of the economic impact of the enactment . . . on their property").

The proper inquiry in a facial challenge is not whether the property owners can demonstrate that property has been taken without providing evidence beyond the text of the regulation; the inquiry is whether the "mere enactment" of the regulation constitutes a taking. *See Keystone*, 480 U.S. at 495 (quotation marks omitted). Thus, in a takings claim, we must look not only at what the statute says, but also at what its mere enactment does. *See Garneau*, 147 F.3d at 807-08. At a minimum, we must look to the general economic principles that allow us to interpret the statute's effect, so that we may understand the regulation's general scope and dominant features. *Cf. Yee*, 503 U.S. at 526-31 (reviewing academic literature to understand the economic effects of a mobile home rent control ordinance); *Keystone*, 480 U.S. at 500-02 (using economic principles to understand the impact of a coal mining regulation where Pennsylvania law creates unique, severable interests inland related to coal mining); *Tahoe-Sierra*, 216 F.3d at 776-77 (using academic literature to develop an analysis to determine whether a temporary moratorium on development effects a taking). In addition, there must be a way to understand the economic impact on the complaining property owner. A property owner who is not permitted at least to present evidence that proves that he has actually suffered the kind of economic harm of which he complains would be precluded from even proving his own standing to bring the claim—the property owner must be permitted to adduce evidence that he has suffered the injury for which he seeks redress. *See Lujan*, 504 U.S. at 563; *Pennell v. City of San Jose*, 485 U.S. 1, 6-7 (1988) (requiring the property owners to allege standing to bring a takings claim by alleging that they are likely to suffer economic injury by enforce-

ment of the challenged ordinance). Thus, even in a facial challenge, the court may consider evidence related to the individual property owner that illustrates the economic impact that the mere enactment of the statute had on that owner and proves that the owner has suffered the injury of which he complains. *See Keystone*, 480 U.S. at 496-99 (considering evidence of the actual tonnage of coal the regulations rendered unremovable); *Garneau*, 147 F.3d at 807-08 (stating that plaintiffs bringing a facial challenge "must show that the value of their property diminished as a consequence" of the regulation); *Richardson*, 124 F.3d at 1154 n.2 (providing an example using exact dollar amounts as "illustrative" of the economic impact of the regulation in a facial challenge).

In this case, the Park Owners submitted evidence of the effect that the mere enactment of the RCO had on their property. The Park Owners principally relied on the report by Dr. Quigley. The City did not object to the use of this report; on the contrary, the City responded by producing its own expert report by Mr. Thomsen. The district court reviewed both parties' expert reports in preparation for its summary judgment ruling in April. In conducting its analysis, the district court did not rely on the detailed information provided in each report about the actual economic impact of the RCO on each particular mobile home within the Park, nor did it rely on the information about the actual impact on the Park as a whole. Instead, the district court relied on the core findings of the expert reports and the general findings taken from economic studies and academic literature about the effects of mobile rent control ordinances generally. On appeal to this court, the City has defended the district court's analysis and its use of core findings from each party's expert report. It

has argued, however, that attempts by the Park Owners to provide evidence beyond the core findings of the Quigley Report is an impermissible attempt to convert a facial challenge into an as-applied challenge. The City has not identified which evidence would be so property-specific as to be impermissible in a facial challenge.

We need not, however, determine the exact boundaries between permissible and impermissible kinds of evidence to support a facial challenge. The City has defended the district court's use of core findings from each party's report. Therefore, we will confine ourselves to review of these same core findings in our review of the Park Owners' facial *Penn Central* challenge. We will provide additional figures from the Quigley Report only for purposes of demonstrating that the Park Owners have suffered the actual economic injury of which they complain and illustrating in concrete terms the economic impact that the "mere enactment" of the RCO had in Goleta. In addition, we may consider the district court's undisputed factual findings about property values in the City of Goleta, as these values affect the entire City, and thus everyone subject to the City's RCO, and are not specific to the RCO's application to the Park Owners. With these limitations in mind, we consider the three factors of the *Penn Central* analysis.

B

The three factors described in *Penn Central* are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action. We consider each in turn.

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[10] The first consideration under *Penn Central* is the "economic impact of the regulation on the claimant." *Lingle*, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124). There is no mathematical formula provided by the Constitution, but "if [the] regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). By definition, under *Penn Central*, the property owners need not show a complete deprivation of all economically viable use of the property. Deprivation of all economically viable use would entitle the property owners to just compensation under *Lucas*, and there would be no need to apply a *Penn Central* analysis. *See Palazzolo*, 533 U.S. at 617 ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred . . . ."). In sum, to prevail under *Penn Central*, the property owner must demonstrate a loss of value that may be less than 100 percent, but high enough to have "go[ne] too far." *Id.*

[11] There is a broad consensus that a mobile home rent control ordinance like the RCO causes a wealth transfer from the mobile home park owners to the incumbent mobile home tenants. The Quigley Report explained how the RCO affects the mobile home market. Mobile homes have a divided ownership. A park owner owns the real estate, consisting of the home sites, while the home itself is owned by the tenant who rents the site. When a jurisdiction enacts a rent control ordinance, the right to occupy a mobile home site at a below-market rent acquires its own intrinsic value distinct from the value of the land. The owner of a given mobile home at the time the RCO is passed will capitalize this value (equal to

the present value of the future stream of rent discounts) into the selling price of the home. This is referred to as the "transfer premium." A new mobile home tenant, anxious to acquire the right to regulated, below-market rent, pays the transfer premium in the paid to the mobile home owner instead of to the park owner.[14] Accordingly, in the end, the RCO

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[14] The Quigley Report illustrated these points with figures for the average property in its sample of dwellings sold in the Park during the relevant period. The Report estimated that, based on comparable land rental rates, the annual unregulated market rental rate of the average site in the Park would be $13,344. The RCO-regulated rental rate on the average site is only $3,256. Thus, a home owner pays roughly $10,000 less in annual rent to the Park Owners. This annual savings, however, is reflected in the selling price of the mobile home. The Report estimated that the average mobile home, but for the RCO, would be worth $14,037. Because of the RCO, however, the average mobile home sold for $119,091. This difference equals $105,054, or a full 88 percent of the entire sale price, and represents the net present value to the mobile home owner of being able to save roughly $10,000 a year in rent.

As a hypothetical, the Quigley Report then calculated what would happen if a mobile home owner financed the average home with a typical mortgage product used for these kinds of purchases. The Quigley Report found that, under the RCO, the average annual housing-related payments of the purchaser would be: $13,968 in loan repayment plus $3,256 in regulated rent. Without the RCO, because the same home would have sold for $105,054 less, but rent would have been more, the average annual housing-related payments would be: $1,646 in loan repayment plus $13,344 in rent. As the Quigley Report noted, in this particular example, the mobile home owner would actually be paying *more* annually under the City's RCO than he would in an unregulated market. This is due in part to the fact that mobile home mortgage products tend to have higher interest rates and their purchasers often have low asset levels or weaker credit histories. In general, however, the Quigley Re-

does not actually decrease housing costs at all for the new tenant. If a new tenant purchases the home, the new tenant will have to pay an amount equal to the rental discount in the form of the transfer premium.

The Quigley Report summarizes the effect of the RCO:

> For every dollar by which housing costs are reduced through lower mobile home rents, consumers are forced to pay higher purchase prices for these mobile homes. These two effects roughly cancel. Thus, the principal effect of the rent control regulation is to inhibit increases in the supply of affordable housing in the market and consequently to increase rents in the local economy. The principal costs are borne by those consumers who otherwise would have been able to reside in lower cost housing in the region.

The Quigley Report estimated that the RCO forced the Park Owners to rent the entire Park at close to an 80 percent discount below the market rate. The RCO has resulted in transfer premiums of approximately 90 percent of the sale price of mobile homes, enjoyed by the incumbent tenants.

[Footnote continued from previous page]

port suggests that mobile home owners will end up paying roughly the same amount in annual expenses whether or not the RCO is in effect. The difference is in who captures the value of the rent-controlled site in the Park. Without the RCO, the Park owners receive roughly $10,000 more a year in rent. With the RCO, the incumbent mobile home owners receive a one-time premium of $105,054, captured in the sale value of their home.

The district court credited the Quigley Report's findings and found that the RCO causes a wealth transfer from the Park Owners to their tenants. The district court found that housing costs in the City of Goleta increased "approximately 205% from 1997 to 2003, and increased another 21.1% in 2004. The rent on the rent-controlled spaces in the Park [has] not kept up with the increase in housing costs." The court found:

> The RCO has resulted in what is known as "transfer premiums" in the sale of mobile homes. These transfer premiums constitute approximately 90% of the sale price of mobile homes in the Park. No provisions in the RCO prevents the seller of a mobile home from capturing transfer premiums.

More simply, "an average mobile home worth $12,000 would sell for approximately $100,000." The district court concluded that "the uncontroverted facts . . . establish the existence of a premium." Indeed, it found that even "[t]he City has acknowledged the existence of such a premium."[15] The Supreme Court observed the same wealth transfer phenomenon in *Yee*:

> [T]he effect of the rent control ordinance, coupled with the restrictions on the park owner's freedom to reject new tenants, is to increase

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[15] The City's own expert, William Thomsen, recognized the existence of the transfer premium in his report: "residents who departed the Park and were able to sell their homes at a premium have received an additional benefit in that the capitalized economic benefit of this rent control could then be used to finance the purchase of another home or otherwise help defray occupancy costs elsewhere."

> significantly the value of the mobile home. This increased value normally benefits only the tenant in possession at the time the rent control is imposed. Petitioners are correct in citing the existence of this premium as a difference between the alleged effect of the [challenged] ordinance and that of an ordinary apartment rent control statute. Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, petitioners contend that the[challenged] ordinance transfers wealth only to the incumbent mobile home owner.

503 U.S. at 530 (internal citation omitted). The Court in *Yee*, however, left open the question of whether the wealth transfer constitutes a regulatory taking under *Penn Central* because the only issue before the Court was whether the wealth transfer constituted a per se taking under *Loretto*. *See id.*

Our past cases have observed the wealth transfer effect as well, but the posture of those cases or differences in takings law when those cases were decided made it unnecessary to reach the question of whether the wealth transfer effected a regulatory taking under *Penn Central*. *See, e.g.*, *Richardson*, 124 F.3d at 1165-66; *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685-89 (9th Cir. 1993); *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276-77, 1279 (9th Cir. 1986) ("[T]he tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara."), *overruled on other grounds by Yee*, 503 U.S. at 529-30; *see*

also Chi. Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 741-42 (7th Cir. 1987) (separate opinion of Posner, J., with whom Easterbrook J., joined) (detailing empirical studies and economic analyses showing that rent control regulations reduce the quantity and quality of affordable housing).[16]

[12] The wealth transfer from the Park Owners to their tenants is a naked transfer accomplished by the mere enactment of the RCO. By taking the value of the Park Owners' mobile home sites and transferring it to the Park's incumbent tenants, the RCO has effected "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984). In the classic naked transfer, the government takes property from A to give to B for the sole benefit of B. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."). In this case, the RCO works slightly differently, as the government does not act

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[16] Academic literature has also discussed the wealth transfer created by mobile home rent control ordinances. *See, e.g.*, William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865, 872-75 (1991);Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399, 405, 423-31 (1988); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 758-59 (1988).

as a fiscal intermediary. Because of the divided ownership of mobile homes—the Park Owners own the real estate and the tenants own the home itself—the transfer can be effected directly by the mere enactment of the RCO. The RCO takes wealth from A, the Park Owners, and transfers it to B, the incumbent tenants, who reap the benefits in the form of mobile homes worth several times their original value.[17]

Incumbent tenants are not the only group that benefit from the City's passage of the RCO. The RCO also benefits another group: those who would like to support affordable housing initiatives without paying for it themselves, for example, owners and developers of other forms of housing such as apartments that might otherwise be forced to provide subsidized housing, and taxpayers who want to subsidize affordable housing without actually increasing their own tax liability to pay for it. *See Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part) ("The politically attractive feature of [rent control] regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be

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[17] As a result, the RCO is unlikely to increase the availability of affordable housing in the City of Goleta, for the widely-recognized reasons summarized in the Quigley Report. The RCO only affects a small portion of the total housing market in the City, and because of the potential to capitalize the value of the regulated rent into the sale price of the mobile home, even within the mobile home market, the RCO does not actually generate mobile home sites that are cheaper to live on than they would be if rents were unregulated. It is easy to see why mobile home tenants would encourage the City to adopt the County's RCO without further investigation as to whether such regulation was necessary in the real estate market of 2002.

achieved 'off budget,' . . . .") Thus, the City, "solely on the ground that those favored have exercised the raw political power to obtain what they want," has taken from A to give to B, both for the benefit of B (the incumbent tenants) and for a larger group, who does not wish to support affordable housing through more politic means. The Takings Clause does not prohibit this use of the police power, *see Kelo*, 545 U.S. at 489-90, but the Takings Clause does not ask us to pretend that such a naked transfer does not cause a severe, observable economic impact on the property owner whose property has been conscripted for the public's use.

The City's principal argument in response is that, even conceding the wealth transfer, the RCO's economic impact on the Park Owners does not amount to a *Penn Central* taking because the Park Owners can still earn a return on their investment.[18] The City supplied some evidence in the Thomsen Report to show that the Park Owners have earned, depending on the analysis, roughly 10 percent on their investment annually. According to the report, this

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[18] The City also claimed that incumbent tenants do not necessarily benefit from the onetime wealth transfer in the form of the "transfer premium" because the transfer is not realized until the tenants sell their homes, and they do not all sell their homes. This claim is irrelevant to the point that real wealth has been transferred. Even if an incumbent tenant does not sell his mobile home, he may have realized value in it. He might, for example, be permitted to borrow against the increased value of the home created by the RCO while he remained in the home. To use the district court's figures, an incumbent tenant who purchased his home before the passage of the RCO for $12,000 could, after the passage of the RCO, take out a home equity loan against a $100,000 house.

return is, again depending on the analysis, comparable to or occasionally better than the return on investment earned by real estate investment trusts and other kinds of investments according to national indices.

The district court credited both the Park Owners' evidence of the wealth transfer and the City's evidence of return on investment. Reviewing the reports together it found:

> Considering all this evidence, a reasonable inference that may be drawn is that although Plaintiffs have received a rate of return on investment comparable to other real estate investments, and although they have enjoyed a significant appreciation in value of their property, Plaintiffs could have received higher rates of return in the absence of the [regulations].

The district court concluded that the wealth transfer was greater than any return on investment:

> The evidence of the rate of return is mixed. Although Plaintiffs have enjoyed a rate of return comparable to other real estate investments, Plaintiffs' evidence tends to suggest that they would have earned more—perhaps much more—in the absence of the RCO.

Nevertheless, the district court reasoned that because the Park Owners could receive *some* return on investment—even though it was less, perhaps even substantially less, than their wealth transfer loss—the Park Owners had not suffered a regulatory taking.

[13] We disagree with the district court's reasoning. The fact that the Park Owners earned some return on investment is not, as the district court rea-

soned, the end of their *Penn Central* claim. Even if the Park Owners earned some return on investment, a taking may have occurred. If the Park Owners could show that the RCO denies them *all* return on investment, they could, of course, prevail on a *per se* takings claim under *Lucas*, and we would not have to labor through the *Penn Central* analysis. *Penn Central* thus practically assumes that the Park Owners may be able to earn some return on investment. Our challenge under *Penn Central* is to figure out what loss of potential return on investment, greater than zero but less than 100 percent, is significant enough to constitute a regulatory taking. *See Tahoe-Sierra*, 535 U.S. at 330. The district court thus erred in the conclusion that because plaintiffs can realize a "rate of return comparable to other real estate investments," the Park Owners have not suffered significant economic harm. *Cf. Hall*, 833 F.2d at 1278 ("The city's argument that [the mobile home park owners] are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred . . . . Whether compensation is adequate is an inquiry separate from whether there has been a taking.").[19]

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[19] The dissent offers a different rationale from the city and the district court. Judge Kleinfeld argues that "[t]here is nothing in the record to support the notion that the Guggenheims' interest in the trailer park was worth more before than after the City reenacted the County ordinance." Dissenting Op. at 13880. As with the question of return on investment, this point is better addressed as a question of the taking compensation due rather than whether there was a taking. As Judge Kleinfeld admits, "[i]f this were a new rent control ordinance . . . this might be an actionable case." Dissenting Op. at 13879-80. It is a new ordinance, which is what makes this case ripe for review.

[14] The Park Owners may have enjoyed a positive rate of return, perhaps even a rate of return comparable to some other real estate investments, but the district court found, and neither the City nor the Thomsen Report denies, that the Park Owners "would have earned more—perhaps much more" if not for the RCO. Although the "much more" does not appear to have been reduced to a total dollars-and-cents loss, the district court also found—again without contradiction—that the loss could be as high as almost 90 percent of the sale price on a site-by-site, home-by-home basis. To illustrate this impact, the Quigley Report did estimate possible losses for individual units in the Park, and some of the figures run upwards of $100,000 per site. By any measure, that is a significant economic transfer from the Park Owners to the tenants, one that must be characterized as a loss for the Park Owners. *Cf. Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (finding that an extraction of 96 percent of the property's value was severe enough to constitute a taking under *Penn Central*). The undisputed evidence shows that the mere enactment of the RCO has caused a significant economic loss for the Park Owners. This factor weighs heavily in the Park Owners' favor.

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[15] The next consideration is "the extent to which the regulation has interfered with distinct in-

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[Footnote continued from previous page]

See supra at 13822-34. We simply disagree that "readoption was merely a ministerial re-enactment . . . [and] had no economic impact on the Guggenheims." Dissenting Op. at 13879-80.

vestment-backed expectations." *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124). Here, it is undisputed that the RCO was passed in Santa Barbara County in 1979 and amended in 1987, and that the Park Owners purchased the Park in 1997. The purchase was eighteen years after the RCO was first passed by the County, but five years before the City of Goleta adopted the RCO in 2002. We agree with the finding of the district court, therefore, that the Park Owners "got exactly what they bargained for when they purchased the Park—a mobile-home park subject to a detailed rent control ordinance."[20] Thus, we take pause at the notion that the Park Owners can claim that the challenged regulation took between 80 and 90 percent of the value out of their rental park when, apparently, this value had been extracted before they purchased the park.

Our analysis of this issue is controlled by *Palazzolo*. In that case, a corporation owned property at the time the government enacted the challenged regulation. 533 U.S. at 613. Palazzolo came into possession of the property in 1978 when the corporation's charter was revoked and title to the property passed, by operation of law, to Palazzolo as the sole shareholder. *Id.* at 614. At that time, the property was already subject to the regulation that designated

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[20] The parties stipulated in their state-court settlement agreement that the RCO, originally a County ordinance, was not in effect for a brief period during the City's process of incorporation, as we have previously noted, *supra* n.2. This fact is relevant to the timeliness of the suit. Nonetheless, for the purposes of considering the Park Owners' investment-backed expectations, the district court found that the RCO had, for all practical purposes, been in effect "unchanged in substance, for all times relevant to the present action."

the property as part of protected "coastal wetlands" upon which development would be limited. *Id.* The Rhode Island Supreme Court held that Palazzolo could not, therefore, bring a takings claim because "[a] purchaser or a successive title holder like [Palazzolo] is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* at 626. As the Supreme Court described the state high court's reasoning, "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased . . . with notice of the limitation." *Id.*

The Supreme Court reversed:

> The State may not put so potent a Hobbesian stick into the Lockean bundle . . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627-28.[21] Further, the Court pointed out that "[t]he State's rule would work a critical alteration to

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[21] The Court limited its reasoning to regulatory takings claims; physical takings claims resulting from a state's direct condemnation of property were distinguished as properly brought only by the property owner at the time of the condemnation. 533 U.S. at 628.

the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. . . . A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 627.

The Court's concern, that a rule precluding post-enactment purchasers from bringing a regulatory taking claim would undesirably insulate the government from liability and allow the state to "secure a windfall for itself," *id.* at 627, is particularly salient on the facts before us. In 2002, the City of Goleta adopted the County's RCO, created to manage housing problems as they existed in 1979, apparently without any formal consideration of whether the problems still existed. Were the fact that the Park Owners purchased the Park when the County RCO was already in existence sufficient to bar their takings claim, the City of Goleta would be insulated from liability for the effects of adopting the RCO when the City incorporated in 2002. All of the existing park owners at that time had bought their parks when the land was still part of unincorporated Santa Barbara County. Unless any of these park owners had purchased their park prior to the original RCO enactment in 1979, all the park owners would have purchased with notice of the original RCO. By its own theory, the City was free to adopt the law with complete impunity, notwithstanding its obvious effects.

The *Palazzolo* Court explained why subsequent property owners do not lose their right to challenge the government's actions:

> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), presented the question whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.*, at 860 (Brennan, J., dissenting). A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*, at 834, n.2.

Palazzolo, 533 U.S. at 629 (internal citations omitted). The Court also rejected analogies between purchasing a property subject to a challenged land-use regulation and purchasing a property whose contours are shaped by background principles of state law:

> It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title.
>
> . . . A regulation or common-law rule cannot be a background principle for some owners but not for others.

> . . . A law does not become a background principle for subsequent owners by enactment itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles.

Palazzolo, 533 U.S. at 629-30. The Court concluded by remanding for consideration of Palazzolo's *Penn Central* claim, stating, "[t]hat claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630.[22]

[16] We have held that *Palazzolo* permits property owners who have purchased property subject to the regulations they challenge to bring regulatory takings claims under *Penn Central*. *See Equity Lifestyle*, 548 F.3d at 1190 (rejecting the county's argument that the property owner could not bring a takings claim because the owner acquired its interest in the property after the ordinance was passed because "a regulatory takings claim 'is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction' " (quoting *Palazzolo*, 533 U.S. at 630)); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002) (holding that "[t]he Court's decision last Term in *Palazzolo* indicates that in some circumstances a purchaser

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[22] Finally, we note that even before *Palazzolo*, the Supreme Court permitted property owners who purchased property subsequent to the enactment of the challenged regulation to bring regulatory takings claims. In *Penn Central* itself, one of the appellants, Union General Properties, acquired its leasehold interest in Grand Central Terminal in 1968, a year after the Terminal was designated as a landmark in 1967. *Penn Central*, 438 U.S. at 115-16.

may have a valid takings claim even if his or her purchase price was discounted to reflect existing land-use regulations," and that *Palazzolo* applied to regulatory but not physical takings claims). Our sister circuits have also observed in dicta that *Palazzolo* permits post-enactment purchasers to prevail on regulatory takings claims. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 34 n.5, 37 (1st Cir. 2002) (en banc) (describing the *Palazzolo* holding as "whether property is acquired before or after a regulation is enacted does not completely determine the owner's reasonable investment-backed expectations"); *Abbott Labs. v. CVS Pharmacy, Inc.*, 290 F.3d 854, 860 (7th Cir. 2002) (analogizing from *Palazzolo* to find that a plaintiff company's claims against another survive the plaintiffs acquisition by another entity).

[17] *Palazzolo* left open the question of how to apply the "investment-backed expectations" analysis to property owners who purchased subject to the regulation. It merely remanded the case with instructions to address the merits of Palazzolo's claim under *Penn Central*. 533 U.S. at 630. Our sister circuits have yet to address the issue. *Penn Central* will not aid us because it never supplied "any 'set formula' " in the first place. *Penn Central*, 438 U.S. at 124. Instead, it "identified several factors that have particular significance" in what the Court described as an "ad hoc, factual inquir[y]." *Id.* After *Palazzolo*, we must continue to consider "[t]he economic impact of the regulation on the claimant" and the "character of the governmental action," *id.*, but we must not deem a regulatory takings claim forfeited simply be-

cause the property changed hands after the regulations went into effect.[23]

[18] We read *Palazzolo* to mean that even though the Park Owners purchased the Park in a regulated state similar to the one imposed by the City, the Park Owners may still prevail under *Penn Central*. How we are to apply *Penn Central* post-*Palazzolo* is less clear. The question of investment-backed expectations yields mixed results. On the one hand, as the district court found, the Park Owners' "expectations of the value of the Park when purchased, as well as the income to be received from the Park, should have been, at all times, tempered by the knowledge that the RCO would have an adverse effect on their investment." On the other hand, when the Park Owners acquired the property, they also arguably acquired the prior owner's interest in the property, including the right to bring a takings action. *See Palazzolo*, 533 U.S. at 627; *see also CAMSI IV v. Hunter Tech. Corp.*, 282 Cal. Rptr. 80, 85 (Cal. Ct. App. 1991) ("the harm implicit in a tortious injury to property is harm to the property itself, and thus to any owner of the property once the property has been injured and not necessarily to a particular owner"). At the very least, the Park Owners have

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[23] We thus do not disagree with the dissent's statement that *Palazzolo* does not suggest that the mere "transfer of title revives dead claims." Dissenting Op. at 13880. But as Justice Kennedy stated in *Palazzolo*, "the postenactment transfer of title" ought not "absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." 533 U.S. at 627 ("[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title.").

the right to bring a takings action based on the City's 2002 adoption of the RCO.

[19] These two interests are in tension and are, in some respects, self-referential: The new owner's investment-backed expectation depends on the value of any takings claim, but whether there is a regulatory taking turns on the owner's investment-backed expectations. In other words, in this context we cannot address the investment-backed expectation prong of *Penn Central* without referring to the merits of the takings claim, but in order to decide the takings claim, we must determine the Park Owners' investment-backed expectations.[24] There is no easy way out of this conundrum. For now we will acknowledge the dilemma: the Park Owners took possession of the Park knowing that it was subject to the County's (but not the City's) RCO. They also assumed ownership with some hope that they would be able to challenge the RCO under the Takings Clause and, as

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[24] Judge Kleinfeld is concerned that the current mobile home tenants may not have received a windfall from the City's adoption of the RCO because they invested in reliance on the City's ordinance. Dissenting Op. at 13881-82. These are fair concerns that might be implicated if the City repealed the RCO in the future. *See Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring). On the other hand, as Justice O'Connor explained, the alternative is that "the State wields far too much power to redefine property rights upon passage of title." *Id.*; *see also id.* at 636-37 (Scalia, J., concurring). We do not think concerns over windfalls (or not) go to whether there has been a taking.

These are difficult questions, ones that—so far as we know—are uncharted. To the extent these questions are relevant, they should be addressed by the district court in the first instance.

they have done here, on equal protection, due process and state law grounds. We conclude, therefore, that the question of investment-backed expectations is not determinative but must be considered in tandem with the economic impact of the regulation on the Park Owners, and the character of the governmental action. *See Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) ("[I]nterference with investment-backed expectations is one of a number of factors that a court must examine.").

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[20] The final consideration is "the character of the governmental action." *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124). We have seen two divergent interpretations of this test, both of which appear to derive from different portions of *Penn Central*. We consider each in turn.[25]

One test, applied less frequently in practice, considers "whether [the governmental action] amounts to a physical invasion or instead merely affects prop-

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[25] The district court applied yet a third version, whether there was anything "sinister in the purpose of," or "suspect" or "pretextual" about the regulations. The court's use of this test in a *Penn Central* analysis was in error, although the test may be relevant to a due process or equal protection claim. The district court evidently imported this requirement from our discussion in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), *overruled in part on other grounds as stated in Crown Point*, 506 F.3d at 853-56. That discussion, in which we considered whether the city's stated purpose in passing a housing code was a pretext for other, less noble purposes, was in the context of an Equal Protection claim that the housing code unfairly targeted certain property owners. *See Armendariz*, 75 F.3d at 1326-27. We did not consider the city's purpose when undertaking our takings claim analysis.

erty interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.' " *Lingle*, 544 U.S. at 538 (quoting *Penn Central*, 438 U.S. at 124). The application of this test to our case is controlled by *Yee*, in which mobile home park owners claimed that a rent control ordinance almost identical to the RCO amounted to a physical taking under *Loretto*. *See* 503 U.S. at 529-30. The Supreme Court held that the rent control ordinance did not amount to the imposition of a physical invasion. *Id.* The Court, however, proceeded to state in no uncertain terms that the fact that the regulations caused a one-time wealth transfer from landlord to the incumbent tenants "might have some bearing on whether the ordinance causes a *regulatory* taking." *Id.* at 530.

The district court thought "the character of the governmental action is less like a *per se* taking and more like a permissible shifting of economic benefits and burdens." We disagree. Although we understand that the RCO does not amount to a physical taking, the RCO is substantially more like a "regulatory taking," *Yee*, 503 U.S. at 530, than a "mere[diminution of the Park Owners'] property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124). The RCO is quite unlike zoning or other restrictions that apply broadly to businesses and residences and inevitably restrict the property's uses. The Court has explained that its various formulations of the test for regulatory takings "(reflected in *Loretto*, *Lucas*, and *Penn Central*) . . . aim[ ] to identify regulatory actions that are functionally equivalent to the classic taking." *Id.* The RCO effects a transfer of the right to rents for the

use of the property from the Park Owners to the tenants. The Park Owners may own the property on which the mobile homes rest, but under the RCO the tenants have the right to convey the home with the right to remain on the site at a much-reduced rent. This looks much more like a classic taking than a mere regulatory burden. This iteration of the "character of the governmental action" test weighs in favor of the Park Owners.

The second, more frequently applied iteration of the "character of the governmental action" test considers whether the challenged regulation places a high burden on a few private property owners that should more fairly be apportioned more broadly among the tax base. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The [Takings Clause] was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *see also Lingle*, 544 U.S. at 542-43 (discussing Armstrong with approval); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (applying *Armstrong* in a regulatory takings claim); *Penn Central*, 438 U.S. at 123.

We find *Cienega Gardens* persuasive as to the application of the *Armstrong* analysis in this case. *See* 331 F.3d at 1338. *Cienega Gardens* found a *Penn Central* taking where two federal statutes abrogated property developers' contractual rights to prepay their forty-year mortgage loans after twenty years. *See id.* at 1323-34. The effect of the statutes was to prevent the developers from exiting the low-rent housing programs in which they were required to participate while carrying the loans. *See id.* at 1323. These statutes led to a 96 percent loss of return on

equity for the developers. *Id.* at 1343. *Cienega Gardens* found that the government action at issue placed the expense of low-income housing on a few private property owners (those who had previously participated in the federal loan program but now wanted to exit), instead of distributing the expense among all taxpayers in the form of incentives for developers to construct more low rent apartments. *See* 331 F.3d at 1338-39.[26]

[21] Here, the RCO applies only to mobile home park owners. The district court found that the City did not impose comparable costs on any other property owners in the City, except as a condition of new development.[27] The City has singled out the Park

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[26] The City argues that *Cienega Gardens* involved an abrogation of the plaintiffs' contractual property rights whereas this case involves an abrogation of the Park Owners' right to charge market rental rates. This distinction is not relevant here. Regulatory takings cases necessarily involve economic analyses, in which the formal characteristics of the transaction are less relevant than the economic substance. For example, in this case, the fact that Park Owners are not allowed to raise rents could also be considered an abrogation of contract rights—their right to contract for annual market-based rent increases. Similarly, the case could be analogized (creatively) to a land-use extraction case: the Park Owners are only permitted to operate a mobile home park in exchange for an agreement to rent it at 80 percent below existing market rates (which in turn could be analogized as an extraction that they may rent 20 percent of the park at full market rates if they agree to permit 80 percent of the tenants to live rent-free). *See, e.g.*, *Yee*, 503 U.S. at 530 (suggesting that a mobile home rent control ordinance may be analogized to a land-use extraction and referencing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)).

[27] For new developers in Goleta, the burden is substantially less severe. Although the Park Owners must rent their entire property at an 80 percent discount, new developers are only

Owners and imposed solely on them a burden to support affordable housing. We find the Federal Circuit's reasoning persuasive and applicable to the facts of this case:

> Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners. Congress' objective in passing ELIHPA[28] and LIHPRHA[29]—preserving low-income housing—and method—forcing some owners to keep accepting below-market rents—is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden. Congress could simply have appropriated more money for mortgage insurance and thereby induced more developers to build low-rent apartments in the public housing program to replace housing, such as the plaintiffs', that was no longer part of the program.

331 F.3d at 1338-39; *see also Pa. Coal*, 260 U.S. at 416 ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders . . . . [A] strong pub-

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[Footnote continued from previous page]

required to make 20 percent of their housing available at below-market rates.

[28] The Emergency Low Income Housing Preservation Act of 1987, 12 U.S.C. § 17151, note (1988).

[29] The Low-Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. §§ 4101 *et seq.* (1994).

lic desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

[22] We do not doubt that the City's objective in passing the RCO was to increase the availability of low-cost housing. Singling out mobile home park owners, however, and forcing them to rent their property at a discount of 80 percent below its market value, "is the kind of expense-shifting to a few persons that amounts to a taking." *Cienega Gardens*, 331 F.3d at 1338-39. Moreover, the City has numerous alternatives for supporting affordable housing—such as tax incentives, low-cost loans, rent supports, or vouchers—without directing the burden at such a limited group. In sum, taking account of the "character of the governmental action" test in this case also weighs strongly in the Park Owners' favor.

C

[23] Having reviewed each factor individually, we must weigh them together. We conclude that the RCO has caused substantial economic hardship to the Park Owners. Property values in the area have increased by 225 percent in the time that the Park Owners have owned the Park, yet the Park Owners have not been permitted to increase rents beyond 75 percent of the annual increase in the CPI. This is a zero-sum game; loss to the Park Owners has become gain to their tenants. The RCO has forced the Park Owners to rent their property at an 80 percent discount below the market value, resulting in transfer premiums equal to approximately 90 percent of the selling price of a mobile home. Thus, the savings created by these below-market rents are transferred directly into the pockets of the incumbent mobile home

tenants, who can now sell their mobile homes for almost ten times their purchase price. *See Yee*, 503 U.S. at 530. Next, we agree with the district court that the RCO has not strongly interfered with the Park Owners' investment-backed expectations because the Park Owners purchased the Park when the Park was already regulated. Nevertheless, the mere fact that the Park Owners bought the Park in its regulated state does not mean that the City has not taken property by regulation or that the Park Owners cannot bring such a claim. *See Palazzolo*, 533 U.S. at 627-28. Finally, we conclude that the RCO looks more like a classic taking than a mere shifting of benefits and burdens, *see Yee*, 503 U.S. at 530, and that the RCO singles out mobile home park owners and forces them to bear a burden of providing affordable housing in the City that should fairly be born by the taxpayers as a whole. *See Armstrong*, 364 U.S. at 49.

[24] On balance, the City's RCO "goes too far" and constitutes a regulatory taking under the Fifth and Fourteenth Amendments for which just compensation must be paid. If the City of Goleta wishes to attempt to increase the availability of affordable housing by transferring the value of renting land within its jurisdiction from the Park Owners to the incumbent tenants, there is no constitutional impediment to doing so.[30] The Fifth Amendment of the U.S. Constitution, however, requires that the City compensate the Park Owners for taking their property by regulation.

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[30] The Park Owners have not claimed that the government action is impermissible because it fails to meet the "public use" requirement. *See Kelo*, 545 U.S. at 472.

IV

The Park Owners also ask us to strike down the RCO as a violation of the Due Process Clause. In *Lingle*, the Supreme Court clarified the difference between a challenge to a rent control ordinance as a takings claim and as a substantive due process claim, and affirmed the independent vitality of both theories. "[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference." *Lingle*, 544 U.S. at 537. As we have explained:

> Due process violations cannot be remedied under the Takings Clause, because if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Crown Point, 506 F.3d at 856 (quoting *Equity Lifestyle Properties*, 505 F.3d at 870 n.16 (citation omitted)). The Park Owners have raised two different theories to support their due process claim, which we address in turn.

A

[25] The Park Owners' more "traditional" due process theory is foreclosed by precedent. The Supreme Court and we have upheld rent control laws as rationally related to a legitimate public purpose. *See Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988); *Equity Lifestyle*, 548 F.3d at 1194; *Carson Harbor Village*, 37 F.3d at 472. In fact, we have already held that a mobile home park rent control ordinance similar to the one at issue survives a due process chal-

lenge. *See Carson Harbor Village*, 37 F.3d at 472. As in this case, the law challenged in *Carson Harbor Village* was ineffective at preserving low-income housing and merely caused a wealth transfer from the park owners to incumbent tenants. We held:

> A generally applicable rent-control ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances . . . . This deferential inquiry does not focus on the ultimate effectiveness of the law, but on whether the enacting body could have rationally believed at the time of enactment that the law would promote its objective.

Id. (internal quotation marks and citations omitted).

B

The Park Owners also raise a second due process theory: that the RCO is a denial of substantive due process because it fails to guarantee that they will earn a "fair and reasonable return" on their investment. For this claim, the Park Owners attack specifically RCO §§ 11A-5 and 11A-6. These sections detail the "automatic increase" of 75 percent of the CPI, and the procedures for requesting a "discretionary increase" where increased operating costs, capital expenses, and capital improvements are greater than the amount of the automatic increase. *See* RCO §§ 11A-5, 11A-6. The Park Owners argue that these provisions will necessarily lead to a time when the Park Owners are denied rent increases that permit a reasonable return on their investment. They also claim that the provisions are constitutionally infirm because they provide no mechanism by which Park

Owners can challenge such rent caps and secure a reasonable return.

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The Park Owners rely on a thin, but viable line of cases. In *Sierra Lake Reserve v. City of Rocklin*, we considered another mobile home park rent control ordinance that, like the one at issue, imposed rent caps and caused a wealth transfer to incumbent tenants. 938 F.2d 951, 954 (9th Cir. 1991), *vacated*, 506 U.S. 802 (1992).[31] The plaintiffs argued that the provisions of the ordinance permitted only a passing through of increased costs, without allowing for a reasonable profit. *Id.* at 958 n.9. Reversing the district court's dismissal on a 12(b)(6) motion, we held that the park owner had alleged a viable substantive due process claim to the extent that the rent control ordinance deprived it of a "fair and reasonable" return on its investment by prohibiting rent increases designed to capture a return on investment in capital improvements:

> Under *Guaranty National [Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990)], every dollar the landlord puts into the property by way of capital improvements constitutes an investment in the property for which a 'fair and reasonable' return must be allowed. Breaking even is not enough; the law must provide for a profit on one's investment. . . . To the extent plaintiff alleges that the rent increases allowed on account of capital im-

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[31] Subsequent to a partial reversal by the Supreme Court on other grounds, we vacated a portion of *Sierra Lake*, but retained the portions relevant to this discussion. *See Sierra Lake Reserve v. City of Rocklin*, 987 F.2d 662, 663 (9th Cir. 1993).

> provements merely offset the cost of those improvements (or less), it has stated a claim for a violation of substantive due process under *Guaranty National*.

Id. at 958 (internal citations omitted).

[26] The Park Owners' claim fails because they have only brought a facial challenge to the RCO. A facial challenge to a law's constitutionality is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The fact that [a challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *Id*; *see also Keystone*, 480 U.S. at 493-95 (1987) (holding that, in a facial challenge, the issue is whether the "mere enactment of the [regulation] constitutes a taking").

[27] The Park Owners argue that the RCO necessarily denies them a just and reasonable return on their capital investments. This contention is belied by the text of the provision. Section 11A-5 provides that annual rent may be increased by 75 percent of the CPI (the "automatic increase"). The Park Owners, who are not satisfied with their RCO-prescribed rent increase may seek arbitration for more rent to cover actual expenses. Such rents are in addition to the automatic increase as a "just and reasonable return on investment." It is plain enough from this scheme that the RCO makes some allowance "for a profit on one's investment" and not "merely [an] offset [for] the cost of those improvements." *Sierra Lake*, 938 F.2d at 958. Although the RCO may not provide a full return on investment in every case, we

are satisfied that the RCO provides for a reasonable profit in at least some circumstances. We recognize that there may be some imprecision between what the RCO will provide as a return and what the Park Owners might consider a reasonable return, but the Due Process Clause does not demand a perfect fit between the economic regulatory scheme and its purpose. *See Reno v. Flores*, 507 U.S. 292, 305 (1993) (holding that the Due Process clause demands no more than a "reasonable fit" between governmental purpose and the means chosen to advance that purpose); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-89 (1955); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050-51 (9th Cir. 2000); *Carson Harbor Village*, 37 F.3d at 472; *Morseburg v. Balyon*, 621 F.2d 972, 979-80 (9th Cir. 1980). Because there are circumstances under which the law would be valid, the Park Owners' facial challenge must fail. *See Salerno*, 481 U.S. at 745.[32]

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[28] The Park Owners also argue that the RCO violates due process because the provision provides no procedural "mechanism" by which they can file a grievance if they are not earning a just and reasonable return, such as a "discretionary application or

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[32] Because the Park Owners' facial challenge fails we do not address whether the district court erred in holding that, as a threshold requirement to raise a "just and reasonable return" claim, the Park Owners must first prove that the government's actions were "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *See Sierra Lake*, 938 F.2d at 957; *see also Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 581-82, 585-86 (1942); *Guar. Nat'l Ins.*, 916 F.2d at 513 (9th Cir. 1990).

provision." *See* RCO § 11A-5(i)(1) ("The arbitrator shall have no discretion to award additional amounts as a just and reasonable return on investment."). This argument, while creative, is an end-run around the Park Owners' previous argument. It fails for the same reason we rejected the prior claim. Although the RCO may lack a process for adjusting the reasonable rate of return similar to the arbitration process for adjusting the discretionary increase to cover operating costs and capital expenses, the absence of a process is only relevant when the Park Owners can demonstrate they have actually been denied a reasonable return. This claim must be addressed as an as-applied challenge, not a facial challenge.

As an alternative argument, the Park Owners attempt to ease the "uphill battle" they face on their facial challenge, *Keystone*, 480 U.S. at 495, by arguing that they should be excused from having to go through the hearing provisions set out in the RCO under the "futility doctrine." Under the futility doctrine, a claimant may bypass the procedures for relief included in the challenged law if such procedures are shown to be "unavailable or inadequate." *Equity Lifestyle*, 548 F.3d at 1191 (quoting *Williamson*, 473 U.S. at 197).

[29] The futility exception applies only if the challenger has already attempted to use the state procedures "and has shown pursuit of such remedies would be futile." *Equity Lifestyle*, 548 F.3d at 1191. The record contains no evidence that the Park Owners have attempted to use the RCO procedures, much less proven them constitutionally inadequate. It would be mere speculation for us to accept the Park Owners' unsubstantiated claims that a request for a rent increase sufficient to secure a reasonable return would be denied. *See Yee*, 503 U.S. at 528 ("Because

petitioners do not claim to have run that gauntlet, . . . this case provides no occasion to consider how the procedure has been applied to petitioners' property, and we accordingly confine ourselves to the face of the statute."); *see also Equity Lifestyle*, 548 F.3d at 1191.

V

[30] Finally, the Park Owners argue that the RCO violates the Equal Protection Clause because it singles out mobile home park owners, as opposed to other sorts of housing providers, to bear the burden of an affordable housing program. This argument is governed by our decision in *Equity Lifestyle*. In that case, we held that a mobile home rent control ordinance does not violate the Equal Protection Clause because it is rationally related to the legitimate public interest of promoting affordable housing. *Equity Lifestyle*, 548 F.3d at 1195. This is true even if the statute singles out mobile home park owners, does not increase the amount of available affordable housing, and "serve[s] the sole purpose of transferring the value of [the park owners'] property to a select private group of tenants." *Id.* at 1193.

VI

[31] State and local governments have a legitimate interest in increasing the availability of affordable housing for their citizens. Translating that interest into effective public policy, however, has proven difficult. The Supreme Court and our court have addressed regulations like the City's RCO with some regularity; we have consistently questioned their ineffectiveness at increasing the availability of affordable housing, and we have commented on their pernicious side effects. *See, e.g.*, *Yee*, 503 U.S. at 530; *Sierra Lake*, 938 F.2d at 953-55; *Carson Harbor Vil-*

lage, 37 F.3d at 472-73; *cf. Richardson*, 124 F.3d 1150 (reviewing a condominium rent control ordinance with similar effects). Nevertheless, so long as these rent control ordinances are "designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances," the Constitution affords state and local governments the flexibility to experiment to find a workable approach to the problem. *Carson Harbor Village*, 37 F.3d at 472. We therefore affirm the district court's findings that the City's RCO does not, on its face, violate the Due Process Clause or the Equal Protection Clause.

When such ordinances "go[ ] too far," however, and require some property owners to support policies that "in all fairness and justice, should be borne by the public as a whole," the Constitution requires that the government provide just compensation. *Lingle*, 544 U.S. at 537 (citation omitted). The *Williamson* prudential ripeness requirements have, for the most part, forced us to close the courthouse door to aggrieved property owners like the Park Owners, and to close our eyes to the extreme effects of laws like the City's RCO. The Park Owners, however, have managed to pry these doors open a bit by developing their case through three rounds of litigation in state and federal court, and the City has forfeited any objection that the case is not fit for review. We will not, therefore, throw these property owners back out and slam the courthouse door shut behind them. Today, our eyes are open. We have weighed the *Penn Central* factors, and we find that the RCO has effected a regulatory taking. Just compensation is due.

[32] We therefore reverse the district court's judgment on the takings claim and remand to the district court for further proceedings. On remand, the district court may of course consider any materials presented by either party that are relevant to determining the total amount of just compensation due to the Park Owners. *See, e.g., Cienega Gardens*, 331 F.3d at 1354. As noted in Part IIIA.1, the district court here did not consider the detailed figures included in either of the expert reports presented before it, possibly because it found that such evidence was precluded under a facial takings challenge under *Penn Central*. We have now held that a facial challenge under *Penn Central* exists as a viable legal claim, *see supra* pp. 13839-40, and affirmed that this court's precedents and the nature of a takings inquiry allow for some evidence outside the text of the statute to be admissible. *Id.* at 13840-43. The district court may therefore properly consider such "detailed figures," in addition to any other evidence it deems relevant, in conducting its analysis to ascertain the precise amount of just compensation owed to the Park Owners. *See, e.g., Richardson*, 124 F.3d at 1154 n.2 (noting that an example using exact dollar amounts is "illustrative" of the economic impact of the regulation in a facial challenge).

Costs shall be awarded to the Appellants.

AFFIRMED in part, REVERSED in part, and REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

I agree with the majority that the prudential ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[1] does not preclude a decision on the merits, and I agree with the majority that the rent control ordinance would amount to a regulatory taking under *Penn Central Transportation Co. v. New York City*,[2] were it not a re-enactment of one already in effect when the Guggenheims purchased the trailer park. But I cannot agree that there was a taking of anything for which the Guggenheims would be entitled to compensation, because they purchased the park after the regulatory takings that mattered.

The challenged rent control ordinance was first passed by Santa Barbara County (the "County") in 1979, and revised in 1987. The Guggenheims bought the trailer park in 1997, which was, at the time, located in an unincorporated part of the County. When the Guggenheims bought the trailer park, the County had long since taken away much of the rising value of the fee from the landlord and given it to the tenants who then owned trailers at the park. By 1997 the purchase price of the trailer park reflected the lower value of the trailer park to the landlord under the ordinance.[3] All the Guggenheims paid for was a trailer park burdened by the rent control ordinance. And when they bought, the statute of limitations had long since run on any takings claims arising from the County's 1979 and 1987 rent control ordinances.

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1 473 U.S. 172 (1985).

2 438 U.S. 104 (1978).

3 Majority op. at 13850-51.

The parties have stipulated that there was a short period during the day of February 1, 2002—the day the City of Goleta (the "City") was incorporated—when the County rent control ordinance did not apply. Later that same day, pursuant to California statute, the City re-adopted the rent control ordinance.[4] Accordingly, the Guggenheims' lawsuit is not barred by the statute of limitations because they challenge the City's adoption, as part of its incorporation, of the County rent control ordinance, which followed the brief period when the ordinance was not in effect. Because the ordinance amounts to a regulatory taking, and not a physical taking,[5] the Guggenheims' challenge must be analyzed as regulatory taking.

We disagree on how to apply the controlling Supreme Court decision, *Palazzolo v. Rhode Island*.[6] In that case, a single shareholder owned a corporation that held land burdened by regulations.[7] When the corporation was dissolved, title to the burdened land

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4 California code requires a newly incorporated city to adopt "prior to performing any other official act, [ ] an ordinance providing that all county ordinances previously applicable shall remain in full force and effect as city ordinances for a period of 120 days after incorporation, or until the city council has enacted ordinances superseding the county ordinances, whichever occurs first." Cal. Gov't Code § 57376. The City did this on February 1, 2002. On April 22, 2002, the City re-adopted the entire County Code, including the rent control ordinance, for an indefinite period, subject to the City's power to amend, repeal, or modify the Code.

5 *Yee v. City of Escondido*, 503 U.S. 519 (1992).

6 533 U.S. 606 (2001).

7 *Id.* at 613-14.

passed to the sole shareholder by operation of law.[8] The government claimed that because the sole shareholder, the plaintiff, did not own the land when its use was restricted, he had no claim for compensation on account of any taking that had occurred when his corporation held title.[9] In this factual circumstance, the Court held that the plaintiff could pursue a claim for compensation, 5 to 4. Five justices wrote for the Court that a regulatory takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[10] Justice O'Connor's concurrence states that the claim was not barred in the circumstances presented in that case. [11] Her stated rule rejects treating a change of ownership before or after the enactment of the regulation as per se barring or not barring a takings claim.[12] Instead, courts "must attend to those circumstances which are probative of what fairness requires in a given case.[13] The four dissenters and Justice O'Connor agreed that acquiring title after the taking could bar a takings claim.[14]

In *Palazzolo*, the transfer of title (by operation of law) had no effect on the wealth of the plaintiff. He merely gained personal title to what he previously

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8 *Id.* at 614.

9 *Id.* at 616.

10 *Id.* at 630.

11 *Id.* at 635-36 (O'Connor, J., concurring).

12 *Id.* at 633, 636.

13 *Id.* at 635.

14 *Id.* at 641 (Stevens, J., concurring in part and dissenting in part); *id.* at 654 n.3 (Ginsburg, J., dissenting); *id.* at 654-55 (Breyer, J., dissenting).

owned as 100% shareholder of the corporation which held title.[15] By contrast, in this case, the Guggenheims bought the trailer park at a price presumably reflecting the impact of the rent control on the prior owners, a price lower than what they would have had to pay without the rent control ordinance. The Guggenheims purchased at arms length a trailer park already devalued by rent control. The land in *Palazzolo* was devalued by the challenged regulations while the plaintiff owned the impacted economic interest as a 100% shareholder in the corporation holding the land.[16]

We have two decisions on point. *Daniel v. County of Santa Barbara* holds that although *Palazzolo* rejects a rule that a purchaser who is aware of existing land-use regulations may never pursue a takings claim, it "did not adopt the converse of that rule," that the successor could always recover.[17] *Daniel* distinguishes *Palazzolo* on two grounds. One is that *Palazzolo* was a regulatory taking (as is the case at bar), while *Daniel* was a physical taking.[18] The second is that "the full value of the [taking] had already been taken from the *Daniels*' predecessors, it took nothing of value from the *Daniels*."[19] This second ground applies to the case at bar.

Equity Lifestyle Properties, Inc. v. County of San Luis Obispo involved another trailer park rent con-

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[15] *Id.* at 614 (majority opinion).

[16] *Id.*

[17] 288 F.3d 375, 384 (9th Cir. 2002).

[18] *Id.*

[19] *Id.*

trol ordinance.[20] Our decision in that case discusses, but explicitly declines to decide whether a plaintiff who had purchased after the ordinance went into effect had a claim under *Palazzolo*.[21] Instead, it rejects the takings claim as barred by the statute of limitations.[22] Since the takings claim failed on an another ground, *Equity Lifestyle* did not need to distinguish *Daniel*.

Our case fits the second *Daniel* distinction from *Palazzolo*, "[b]ecause the full value of the [taking] had already been taken from the *Daniels*' predecessors, it took nothing of value from the *Daniels*."[23] It also fits the limitation Justice O'Connor imposed in *Palazzolo*. Her opinion, and *Daniel*, would both have us "attend to those circumstances which are probative of what fairness requires in a given case."[24] Since the Guggenheims benefitted from a lower purchase price reflecting the burden of the rent control ordinance when they bought the trailer park, fairness does not require that they be compensated. Taking from Peter does not require giving compensation to Paul.

If this were a new rent control ordinance and a previous owner had transferred the trailer park to the Guggenheims before the statute of limitations had barred the seller's claim, then this might be an actionable case. But it is not. The naked wealth transfer was in the 1970's. The 2002 re-adoption was

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[20] 548 F.3d 1184 (9th Cir. 2008).

[21] *Id.* at 1190 n.11.

[22] *Id.* at 1193 & n.15.

[23] *Daniel*, 288 F.3d at 384.

[24] *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

merely a ministerial re-enactment that did not transfer wealth from the Guggenheims.

Or, if there had been a substantial period of time, instead of less than one day, when the rent control ordinance had not been in effect, and if the Guggenheims had bought at a price reflecting freedom to charge market rents, they might have suffered an impairment of their investment-backed expectations or a negative economic impact.[25] But that is a hypothetical circumstance neither argued nor, on the facts of this case, arguable. There is nothing in the record to support the notion that the Guggenheims' interest in the trailer park was worth more before than after the City reenacted the County ordinance.[26] The reenactment had no economic impact on the Guggenheims.[27]

The Guggenheims cannot demonstrate any investment backed expectations that were harmed by the 2002 reenactment of the ordinance unless they breathe life into the takings claims that prior owners never brought. When the prior owners let the statute of limitations run without challenging the 1970's ordinance and the 1987 reenactment, their claim expired. *Palazzolo* does not undermine the rule that "a takings claim must [ ] comply with timeliness requirements."[28] The time-barred claims could not es-

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[25] *See supra* note 4 and accompanying text.

[26] *Garneau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998).

[27] *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005) (quoting *Penn Central*, 438 U.S. at 124).

[28] *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1190 (9th Cir. 2008).

tablish investment backed expectations. *Palazzolo* does not suggest that a transfer of title revives dead claims. Instead, *Palazzolo* holds that transfer of title will not necessarily bar a takings claim, a quite different proposition. In one case, there is no longer a claim and in the other, there is a claim that has changed hands.

The Guggenheims purchase of the trailer park in 1997 did not breathe life into the dry bones of the takings claim that had died years before.[29] As the majority opinion concedes, the Guggenheims "got exactly what they bargained for when they purchased the Park-a mobile-home park subject to a detailed rent control ordinance."[30] The City took nothing from what they bought.

The third factor analyzed by the majority, the "character of the government action,"[31] is a continuation of the old ordinance, the same one that applied when the Guggenheims bought the trailer park. The brief gap and readoption did not reapportion public burdens, as did the 1987 and 1979 ordinances.[32]

Because the rent control ordinance did not harm the Guggenheims, they do not have a regulatory takings claim under *Penn Central Transportation Co. v. New York City*,[33] or the test Justice O'Connor set forth in *Palazzolo*, which forces us to consider "what

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[29] *Ezekiel* 37:1-14 (King James).

[30] *See Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124).

[31] *Id.* (quoting *Penn Central*, 438 U.S. at 124).

[32] *Armstrong v. United States*, 364 U.S. 40, 49 (1960)

[33] 438 U.S. 104 (1978).

fairness requires in a given case."[34] Fairness cuts the other way.

Unfairness arises in this case in quite another quarter because of the market distortions created by the rent control ordinance during the years after its enactment in 1979. As the majority explains, the rent control ordinance has had the effect of raising the average price of a trailer in the park by $105,054, 88% of the sale price.[35] But for the rent control ordinance, the average trailer would be worth only $14,037. The people who really do have investment backed expectations in this circumstance are those who have bought trailers since rent control went into effect. Tenants come and go, and even though rent control transfers wealth to "the tenants," after a while, it is likely to affect different tenants from those who benefitted from the transfer. The present tenants lost nothing on account of the City's reinstitution of the County ordinance. But they would lose, on average, over $100,000 each, if the rent control ordinance were repealed. They have no legal protection against repeal, and have invested, essentially, in reliance on the stability of government decisions that create market distortions.[36] Repeal would not

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[34] *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

[35] Majority Op. at 13837 n.11.

[36] *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1403 (9th Cir. 1993) (holding that "[r]easonable expectations arising out of past policy but without a basis in cognizable property rights may be honored by prudent politicians, because to do otherwise might be unfair, or because volatility in government policy will reduce its effectiveness in inducing long term changes in behavior. But violation of such expectations cannot give rise to a Fifth Amendment claim."); *see also Nat'l Union Fire Ins. v. United States*, 115 F.3d 1415, 1422 (9th Cir. 1997);

amount to a taking, but continuation of the ordinance deprives no one, not the plaintiffs and not the tenants, of any compensable value.

[Footnote continued from previous page]

Peterson v. U.S. Dep't of Interior, 899 F.2d 799, 812-13 (9th Cir. 1990).

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL GUGGENHEIM; SUSAN GUGGENHEIM; MAUREEN H. PIERCE,	)	CV 02-2478 FMC (RZx)
	)	**JUDGMENT**
Plaintiffs,	)	
vs.	)	
CITY OF GOLETA,	)	
Defendant.	)	

This matter came before the Court, the Honorable Florence-Marie Cooper, United States District Judge, presiding, on April 3, 2006, on Plaintiffs' Motion for Partial Summary Judgment. Subsequent to its denial of said Motion and upon its review of the parties' Motions in Limine in anticipation of the impending trial, as well as the parties' proposed Pre-Trial Order, the Court issued an Order to Show Cause as to why the Court should not, on its own motion, enter Summary Judgment in favor of Defendant. Having reviewed the parties' briefing in response to the Order to Show Cause, the Court concludes that Defendant is entitled to Judgment as a matter of law on all of Plaintiffs' remaining causes of action.

Because this is a facial challenge to the ordinance in question, the evidence Plaintiffs seek to offer at trial vis a vis their Fifth Amendment takings clause claim is irrelevant. To facially attack the ordinance as an uncompensated "taking," Plaintiffs must demonstrate that the mere enactment of the ordinance constitutes a taking.

In *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), zoning ordinances were challenged as facially unconstitutional because they resulted in a taking of plaintiffs property. The Court explained that the test to be applied in considering a facial challenge is quite simple: a statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land." *Id.* at 260; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 94 L. Ed. 2d 472 (1987) ("The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land . . . .") (internal quotations omitted). Plaintiffs "thus face an uphill battle in making a facial attack on the [ordinance] as a taking." *Keystone*, 480 U.S. at 495. A facial challenge to a law's constitutionality is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

Courts are strongly discouraged from declaring statutes invalid as a result of a facial challenge. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-295, 101 S. Ct. 2352 69 L. Ed. 2d 1 (1981). The finding that a statute, on its face, could

not be constitutional under any set of circumstances, will rarely be made. The constitutionality of statutes should not be decided in a vacuum—i.e., absent an actual factual setting allowing for an ad hoc inquiry. *See id.* Courts are to examine factors such as the economic impact of the regulation and its interference with reasonable investment-backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979). However, the development of a record sufficient to allow such analysis only occurs in an as-applied challenge, with its attendant administrative exhaustion requirements. *See, e.g., MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 358, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-87, 105 S.Ct. 3108, 87 L. Ed. 2d 126 (1985).

Plaintiffs here argue that they can establish denial of economically viable use of their land, with evidence that they do not receive a fair return on their investment under the City's ordinance. The same argument was made in the context of a facial challenge in *Lake Nacimiento Ranch v. San Luis Obispo County*, 841 F.2d 872, 878 (9th Cir. 1987) and discounted by the Court. *Cf. William C. Haas & Co. v. San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979) ("That the zoning restrictions prevent Haas from recovering its investment does not mean that they are constitutionally defective. . . .").[1] Indeed, by focusing

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[1] Hass involved an as-applied challenge to City of San Francisco zoning regulations which limited the maximum height of buildings. Hass, a developer who purchased property in the affected area prior to their enactment, maintained that the regulations effected a "taking" because, with the burden of the

exclusively on the issue of whether *they* can receive a favorable return on *their* investment, the Court believes that Plaintiffs have impermissibly attempted to convert this action, *de facto*, into an as-applied challenge. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000) ("In facial takings claims, our inquiry is limited to whether the mere enactment of the [regulation] constitutes a taking. For that reason, we look only to the regulation's general scope and dominant features, rather than to the *effect of the application of the regulation in specific circumstances.*") (internal quotations and citations omitted) (emphasis added). As the Court recognized in its consideration of the summary judgment motion, the express provisions of the ordinance *do* allow for a potential for a fair return on capital expenses to some potential owners, if not Plaintiffs in particular. *See* Order Denying Motion for Partial Summary Judgement, April 4, 2006, at 18:16-23; *see also* City of Goleta's Response to Order to Show Cause, at 4-6. Accordingly, circumstances exist under which the ordinance may be Constitutionally valid, such that Plaintiffs' facial challenge simply cannot succeed.

In any event, as *Hass* instructs, even had Plaintiffs brought an as-applied challenge , mere loss of an opportunity to recoup profit expectations is not necessarily sufficient to constitute a taking. *Hass*, 605 F.2d at 1121 ("Of course, Haas would not have paid as much for the property as it did if it had known that it would not be able to build high-rises on it.

[Footnote continued from previous page]

height restrictions, there was no remaining "economically viable" use for its property.

But its disappointed expectations in that regard cannot be turned into a taking . . . ."). Plaintiffs' position in this case is even weaker than that of the plaintiff in *Hass* since, as noted in the Court's April 4, 2006 Order, they purchased their property when the City of Goleta's ordinance was already in effect.

Finally, in *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L. Ed. 2d 153 (1992), mobile home park owners claimed a local rent-control ordinance violated the takings clause. The Supreme Court concluded that, on their face, the laws at issue only regulated the *use* of land, by regulating the relationship between landlord and tenant. Such regulation does not amount to a taking. The allegation, also made here, that the effect of the law was a transfer of wealth from landlords to tenants, (while more obvious where, as here, the tenants may sell their homes at a premium) did not convert regulation into physical invasion. *Id.* at 1529.

Plaintiffs also contend that the provisions of the ordinance, which impair their ability to obtain full reimbursement for capital and other expenditures, deprive them of a fair and reasonable return on their investment in violation of substantive due process, citing *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d. 951, 957-58, (9th Cir. 1992), *vacated in part on other grounds*, 987 F.2d 662 (9th Cir. 1993). The fallacy in this argument is that it ignores the threshold requirement that "[t]o establish a violation of substantive due process, [plaintiffs] 'must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.'" *Id.* (quoting *Sinaloa Lake Owners Asso. v. Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) (quoting *Village*

of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926))).

As this Court previously held, there is no evidence of arbitrary or unreasonable conduct on the part of the government in enacting the ordinance in this case. Plaintiffs rely on language in *Sierra Lake*, *supra*, to the effect that they could establish a due process claim if they demonstrated a deprivation of a fair and reasonable return on investment. However, that language and analysis followed the court's conclusion that it was "well within the realm of possibility" that plaintiff could establish that the government's conduct was wrongful or arbitrary. Having failed to meet that threshold requirement in this case, Plaintiffs' evidence of their actual rate of return is irrelevant.

Based on the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT is entered in favor of Defendant. Defendant shall have and recover its costs of suit pursuant to Fed. R. Civ. P. 54(d)(1) and Local Rule 54.

September 5, 2006

/s/ Florence-Marie Cooper
FLORENCE-MARIE
COOPER, Judge
UNITED STATES DISTRICT
COURT

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Daniel Guggenheim, et al.,	)	CV 02-02478 FMC (RZx)
Plaintiffs,	)	ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT;
vs.	)	
City of Goleta,	)	
Defendant.	)	ORDER DENYING EX PARTE APPLICATION FOR CONTINUANCE.

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment (docket #40). The Court has read and considered the moving, opposition, and reply documents filed in connection with this Motion.

The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for November 1, 2004, is removed from the Court's calendar.

Defendants have filed an Ex Parte Application seeking a continuance of the November 1, 2004, hearing. Because the Court deems the matter ap-

propriate for decision without oral argument, Defendants' request is moot. It is denied for that reason.[1]

For the reasons and in the manner set forth below, the Court grants Plaintiffs' Motion. The Court grants summary judgment in favor of Plaintiffs as to their claim brought pursuant to the Takings Clause of the Fifth Amendment to the United States Constitution. In light of the Court's holding that the challenged ordinance is unconstitutional under the Takings Clause, the Court does not consider Plaintiffs' due process and equal protection challenges.

I. Background

A. Nature of the Case

This action arises out of a the adoption of a mobile home rent-control ordinance by the recently incorporated City of Goleta ("the City"). Plaintiffs are mobile-home park owners with properties that are subject to the rent-control ordinance.

B. The Court's October 3, 2003, Order

The Court, in its October 3, 2003, Order, previously considered a number of legal issues relevant to the claims addressed by the present Motion. Specifically, the Court narrowed the scope of Plaintiffs' takings claim to a facial challenge to the rent-control ordinance, holding that any "as-applied" challenge to

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[1] The Ex Parte Application advised the Court of the pendency of a request for rehearing en banc of a Ninth Circuit decision that addresses the Takings Clause question at issue in this Motion. It also advised the Court that the United States Supreme Court has granted certiorari on a case that addresses this issue. Nevertheless, the Court sees no need to delay the issuance of the present Order based on speculation that Ninth Circuit law regarding this issue may change.

the ordinance was not ripe because Plaintiffs had not sought "just compensation" through a state inverse condemnation claim. (Oct. 3, 2003, Order at 6-8). Based on this holding, the Court rejected the argument that Plaintiffs' substantive due process and equal protection' claims were not ripe. *Id.* at 11-12.

The Court also rejected the argument that Plaintiffs' claims were barred by the statute of limitations, holding that although the ordinance was a mere re-enactment by the newly incorporated City of an ordinance that had been previously in effect as a County ordinance, the re-enactment started anew the limitations period applicable to Plaintiffs' constitutional claims. *Id.* at 8-9.

Finally, the Court also rejected an argument that Plaintiffs lacked standing, due to their lack of injury, because they became mobile-home park owners after the County enacted its ordinance, noting that the ordinance should be viewed as newly adopted by the City upon its re-enactment. *Id.* at 10-11.

The Court declined to exercise supplemental jurisdiction over the related state-law claims, and dismissed those claims without prejudice to their being refiled in state court. The Court then stayed the action under the *Pullman* abstention doctrine[2] pending resolution of Plaintiffs' state-law claims.

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[2] "*Pullman* abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998).

C. The State-Court Action

The parties have since settled their state-law claims. As part of the settlement, the parties entered into a stipulation, which the Court has entered as an order in this action. This stipulation provides, *inter alia*, that neither party shall appeal from the Court's October 3, 2003, Order, and that Plaintiffs' claims were asserted within the relevant limitations period.

II. Uncontroverted Facts

Plaintiffs purchased Rancho Mobile Estates Mobilehome Park ("the Park") in what is now Goleta (formerly an unincorporated area of Santa Barbara County), California, in 1997. The County of Santa Barbara had a mobile home rent control ordinance in place for unincorporated areas of the County since approximately 1987. The Park was subject to the Santa Barbara Ordinance while the Park was in the unincorporated area. The City of Goleta adopted mobile home rent control as part of a generalized adoption (and subsequent readoption) of the Santa Barbara County Code when the City was created. There was a gap in time when no rent control was in effect as to the Park owned by Plaintiffs.

The express purpose of the ordinance is set forth in the Goleta City Code:

> A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who reside in rental housing. These conditions endanger the public health and welfare of the

> County of Santa Barbara. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobilehome parks in the County of Santa Barbara. Because of such factors and the high costs of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobilehome park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by imposing rent controls in mobilehome parks within the unincorporated area of the county[3] of Santa Barbara.

Goleta City Code, § 11A-1. The City does not require any other existing property owners to contribute to or subsidize affordable housing in the City, except as a condition of new developments.

The ordinance limits any annual increase in rents at the Park to the lesser of 75% of the increase

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[3] Based on the wholesale adoption of the Santa Barbara County Code by the City of Goleta, the Court is satisfied that the City Council intended this ordinance to apply to area that was incorporated as the City of Goleta.

in the Consumer Price Index ("CPI") or 5%. The ordinance also contains a vacancy control provision, which limits to 10% the increase in rent when a mobile home is sold. The ordinance has a discretionary rent increase application process whereby Plaintiffs may request additional rent increases, but these increases are limited to those that are needed to reimburse the Park for increased costs.

During the time that Plaintiffs have owned the Park, housing costs in the City have increased approximately 225%. Because of the rent-control ordinance, the rents charged by Plaintiffs have not kept pace with this increase. The result of the existence of lower-than-market value rents has resulted in the ability of mobilehome owners to sell their homes at a significant premium. According to the analysis of Plaintiffs' expert, based on the sale of 64 mobile homes from January 15, 1999, through July 21, 2004, the premium amounted to, on average, 88% of the sale price. (Quigley Report at T-2, attached as Ex. 7 to the Quigley Declaration). In other words, an average mobile home worth $12,000 would sell for approximately $100,000. The City has acknowledged the existence of such a premium. *See* Stouder Depo.[4] at 120, 142-43.)

III. Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

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[4] Mr. Stouder was designated by the City, pursuant to Fed. R. Civ. P. 30(b)(6), as the "person most knowledgeable" regarding the rent-control ordinance.

material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348,89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248, 106 S.Ct. 2505.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude the use of summary judgment. *See Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989).

The Court construes all evidence and reasonable inferences drawn therefrom in favor of the nonmoving party. *See Anderson*, 477 U.S. at 255; *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir. 1995).

III. Takings Claim

The uncontroverted facts establish the existence of a premium on the sale of mobile homes as a result of the rent-control ordinance. Absent a mechanism to keep those who sell their mobile homes from reap-

ing this benefit, the ordinance is an unconstitutional taking under Ninth Circuit law.

In *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), the court considered an ordinance that controlled the rent increases of land, subject to long-term leases, upon which condominiums were built. The City of Honolulu passed an ordinance that restricted the intervals at which the rent of land could be renegotiated (15-year, 10-year), and tied the maximum rent increase to the Consumer Price Index.[5] *Richardson* was decided at the summary judgment stage. The evidence showed that the rent-control ordinance affected the price of the condominiums. The seller could demand a higher price for the condominium because it was on rent-controlled land. The Ninth Circuit invalidated the ordinance on constitutional grounds. The court held that the rent-control ordinance constituted an unconstitutional taking because it failed to substantially further the goal of creating affordable housing due to the premium paid by the buyer to purchase a condo on rent-controlled land:

> [The challenged ordinance] does not substantially further the goal of creating affordable housing. The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent[,] in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing . . . . Incumbent owner occupants who sell

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5 This ordinance is similar to the ordinance at issue in this case, and in both situations, the structure built or placed on the land is owned by the lessee, but the land is leased.

> to those who intend to occupy the apartment will charge a premium for the benefits of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking.

Id. at 1165-66.

Two more recent Ninth Circuit opinions have reaffirmed this central holding of *Richardson*. First, in *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004), the Ninth Circuit held unconstitutional a rent-control ordinance with the stated purpose similar to the one at issue here. *Id.* at 890. There, the Ninth Circuit noted the existence of a premium on the sale of mobile homes as a result of the ordinance, and the absence of a mechanism that prevented the mobile home owner from capturing a premium on the sale. *Id.* at 899. This combination resulted in an unconstitutional taking because the ordinance did not substantially advance its stated purpose. *Id.*

Second, in *Chevron v. Bronster*, 363 F.3d 846 (9th Cir. 2004), the trial court held unconstitutional under the Takings Clause a rent-control law that limited the rent oil companies could collect from dealers who leased company-owned service stations. The trial court's ruling was based on evidence that the reduced rent mandated by the ordinance would not flow to consumers (as intended) but would instead allow lessees to charge a premium for their leaseholds. *Id.* at 857. The Ninth Circuit affirmed.

The uncontroverted facts in this case establish the existence of a premium. The ordinance at issue contains no mechanism for preventing mobile home owners from capturing the present value of the reduced rents as a premium on the sale of their mobile

homes. As such, the ordinance fails to substantially advance its stated purpose. Therefore, pursuant to *Richardson*, *Cashman*, and *Bronster*, the ordinance is an unconstitutional regulatory taking, and Plaintiffs are entitled to summary judgment as to their takings claim, their fourth and fifth causes of action.[6]

IV. Substantive Due Process and Equal Protection Claims

Because the Court has held that the challenged ordinance is, on its face, unconstitutional and invalid under the Takings Clause, the Court does not consider Plaintiffs' due process and equal protection challenges.

V. Conclusion

For the reasons and in the manner set forth above, the Court on Plaintiffs' Motion for Partial Summary Judgment (docket #40) is granted. The Court grants summary judgment in favor of Plaintiffs as to their claim brought pursuant to the Tak-

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[6] A portion of Plaintiffs' fourth cause of action is based on the Equal Protection Clause. Because the Court holds that the ordinance is unconstitutional under the Takings Clause, the Court has not considered whether the ordinance violates due process or equal protection. According, the Court's grant of summary judgment does not extend to that portion of Plaintiffs' fourth cause of action that is based on an alleged denial of equal protection.

Additionally, the portions of Plaintiffs' First Amended Complaint ("FAC") that set forth the fourth and fifth causes of action contain a number of legal arguments. The Court holds that the ordinance at issue is an unconstitutional regulatory taking based on the rationale set forth above, rather than all of the legal bases advanced by Plaintiffs in the FAC. *See, e.g.*, FAC ¶¶ 42(c)-(e), 48.

ings Clause of the Fifth Amendment to the United States Constitution, their fourth and fifth causes of action.

Dated: October 29, 2004

/s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

Santa Barbara County Code § 11A-1 (2002) provides:

Sec. 11A-1. Purpose.

A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who reside in rental housing. These conditions endanger the public health and welfare of the County of Santa Barbara. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobilehome parks in the county of Santa Barbara. Because of such factors and the high cost of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobilehome park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by imposing rent controls in mobilehome parks within the unincorporated area of the county of Santa Barbara.

Santa Barbara County Code § 11A-5 (2002) provides:

Sec. 11A-5. Increases in maximum rent schedule.

(a) Management's notice of an increase in the maximum rent schedule shall:

(1) Comply with state law; and

(2) Indicate whether or not the percentage of noticed increase in relation to the previous maximum rent schedule, less allowed costs for capital improvements and/or capital expenses, if any, is in excess of seventy-five percent of the percentage by which the most recently published edition of the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Urban Wage Earners and Clerical Workers, Los Angeles-Long Beach-Anaheim area, all items, Base Index 1967=100, shows that such index has increased during the immediately preceding twelve months for which said index has been published at the time notice of the increase was given or since the last rent increase (hereinafter called "in excess of seventy-five percent of CPI"); and

(3) Where the noticed increase is in excess of seventy-five percent of CPI, management shall:

(A) Itemize amounts for increased operating costs; any capital expenses incurred in the prior year to be undertaken for which reimbursement is sought, hereinafter "new" capital expenses; any capital expenses allowed in prior years but not fully reimbursed, hereinafter "old" capital expenses; any offset against new or old capital expenses; and capital improvements.

(B) Set a meet and confer session. The procedure for meet and confer shall be set out in the rules for hearing.

(b) Homeowners may, no later than forty-five days after the date of notice, file a petition for hearing to contest the proposed increase but only if the increase is in excess of seventy-five percent of CPI.

(c) The hearing shall be set by the clerk, held before an arbitrator, and governed by the provisions of this chapter and of the rules for hearing.

(d) The arbitrator shall deny a hearing on a noticed increase:

(1) Where management has not waived its right to object and proves by a preponderance of evidence that:

(A) The homeowners' petition for hearing was not supported by a homeowner majority or was untimely filed. For purposes of this determination, management may require the testimony of the clerk but may not require the production of homeowner's petitions or copies thereof, except that said petitions may be examined by the arbitrator; or

(b) The noticed increase is not in excess of seventy-five percent of CPI; or

(2) Where no homeowners' representatives attended the meet and confer.

(e) The arbitrator shall deny an increase in the maximum rent schedule where homeowners prove by a preponderance of evidence that:

(1) Management has previously increased the maximum rent schedule such that the effective date of the proposed increase will be less than twelve months after the effective date of the previous increase; or

(2) Management has failed to provide a meet and confer session.

(f) If the hearing and/or increase is not denied pursuant to the foregoing paragraphs, the arbitrator shall consider all relevant factors to the extent evidence thereof is introduced by either party or produced by either party on request of the arbitrator.

(1) Such relevant factors may include, but are not limited to, increases in management's ordinary and necessary maintenance and operating expenses, insurance and repairs; increases in property taxes and fees and expenses in connection with operating the park; capital improvements; capital expenses; increases in services, furnishings, living space, equipment or other amenities; and expenses incidental to the purchase of the park except that evidence as to the amounts of principal and interest on loans and depreciation shall not be considered.

(g) The arbitrator shall automatically allow a rent increase of seventy-five percent of the CPI increase (hereinafter "automatic increase").

(h) The arbitrator may allow an increase in excess of the automatic increase for increased costs where increases in expenses and expenditures of management justify such increase.

(i) To determine the amount of any increase in excess of the automatic increase, the arbitrator shall:

(1) First, grant one-half of the automatic increase to management as a just and reasonable return on investment. The arbitrator shall have no discretion to award additional amounts as a just and reasonable return on investment;

(2) Next, grant one-half of the automatic increase to management to cover increased operating

costs. The arbitrator shall have no discretion to award less than this amount for operating costs;

(3) Next, add an amount to cover operating costs, if any, in excess of one-half of the automatic increase. The arbitrator shall have discretion to add such amounts as are justified by the evidence and otherwise permitted by this chapter;

(4) Next, add an amount to cover new capital expenses. Where one-half of the automatic increase is more than the actual increase in operating costs for the year then ending, the arbitrator shall offset the difference against any increases for new capital expenses;

(5) Next, add an amount to cover old capital expenses. Where one-half of the automatic increase is more than the actual increase in operating costs for the year then ending, the arbitrator shall offset the difference against any increase for old capital expenses unless such difference has already been used to offset an increase for a new capital expense or another old capital expense. The arbitrator shall have discretion to review operating costs and the sufficiency of any offset, but not to redetermine the right of management to reimbursement for an old capital expense.

(6) Finally, add an amount to cover increased costs for capital improvements, if any. The arbitrator shall have discretion to add such amount as is justified by the evidence and otherwise permitted by this chapter.

(j) The total increase shall not exceed the amount in management's notice of rent increase.

(k) Evidence as to costs to be incurred prior to the next rent increase may be considered only where

such evidence shows that these costs are definite and certain.

(l) Increases in the maximum rent schedule set by the arbitrator shall become effective as of the effective date in the notice or rent increase.

Santa Barbara County Code § 11A-6 (2002) provides:

Sec. 11A-6. Capital improvements and capital expenses.

(a) Capital Improvements.

(1) The cost of capital improvements incurred or proposed, including reasonable financing costs, may be passed on to homeowners at the time of an annual increase:

(A) After written approval of a homeowner majority without hearing; or

(B) After failure of homeowners to contest a rent increase which includes costs for capital improvements; or

(C) After approval at hearing.

(2) Any notice of a rent increase which is in excess of seventy-five percent of CPI and includes costs for capital improvements shall contain a payment plan showing the cost of the improvement per mobilehome space and the time period required to amortize the cost of the improvement, e.g., ten dollars per space for seventy-two months.

(3) Notwithstanding any other provision to the contrary, the cost of capital improvements required by a change in governmental law or regulation may be automatically passed on to homeowners at the time of an annual increase. Any hearing on such costs shall be solely for the purpose of determining whether management's plan for compliance or for recoupment of costs is unreasonable if so alleged by homeowners.

(4) Management shall deduct increases allowed for capital improvements at the time which was

specified by the arbitrator, or if no time was so specified, then at the time specified by the payment plan.

(A) If management fails to automatically deduct such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(B) If the arbitrator finds that management failed to deduct the increase, the arbitrator shall order management to credit such amount to each homeowner retroactive to the date the increase should have been deducted together with interest at the legal rate.

(5) If management fails to begin construction of a capital improvement within six months after approval of the cost of the capital improvement, then management shall discontinue the increase for the capital improvement and shall credit any amounts collected to each homeowner. If management fails to automatically discontinue such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(b) Capital Expenses.

(1) The cost of capital expenses incurred or proposed, including reasonable financing costs, may be passed on to homeowners at the time of an annual increase.

(2) Any notice of a rent increase which is in excess of seventy-five percent of CPI and includes costs for capital expenses shall contain a payment plan which shows the amount needed per month to amortize the cost of the capital item(s) over the useful life

of the item(s). Payment plans for old capital expenses are not subject to modification by the arbitrator unless mutually agreed to by management and homeowners.

(3) Notwithstanding any other provision to the contrary, the cost of capital improvements required by a change in governmental law or regulation may be automatically passed on to homeowners at the time of an annual increase. Any hearing on such costs shall be solely for the purpose of determining whether management's plan for compliance or for recoupment of costs is unreasonable, if so alleged by homeowners.

(4) Management shall deduct increases allowed for capital expenses at the time which was specified by the arbitrator, or if no time was so specified, than at the time specified by the payment plan.

(A) If management fails to automatically discontinue such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(B) If the arbitrator finds that management failed to discontinue the increase, the arbitrator shall order management to credit such amount to each homeowner retroactive to the date the increase should have been deducted together with interest at the legal rate.

(5) If management fails to begin construction of a capital expense item within six months after approval of the cost of the capital expense, then management shall discontinue the increase for the capital expense and shall credit any amount collected to each homeowner. If management fails to automati-

cally discontinue such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(c) Whenever costs for capital improvements and/or capital expenses are included in rent, management shall provide each homeowner at least once a year a statement showing the following:

(1) The amount of rent without charges for capital improvements and/or capital expenses;

(2) The monthly amount for each capital improvement and/or capital expense;

(3) The date by which the charge for each capital improvement and/or capital expense will be fully amortized;

(4) If this information is provided in an annual notice of rent increase, an additional statement is not required.

Santa Barbara County Code § 11A-8 (2002) provides:

Sec. 11A-8. Collection and frequency of increases.

(a) Management may increase the maximum rent increase schedule no more than once a year for tenancies not subject to a lease. Assuming proper notice, management may collect increases as of the effective date of increase specified in the notice.

(b) Where a homeowner majority has petitioned for a hearing on an increase and the hearing is to be held after the effective date of increase, management may collect the increase pending the arbitrator's decision; however, any portion of an increase in excess of seventy-five percent of the CPI increase shall be placed in an interest-bearing account in the name of management as trustee for the homeowners of that park.

(1) Where the arbitrator approves the full amount of noticed increase, management shall be entitled to retain the full amount in the interest-bearing account together with accrued interest, if any.

(2) Where the arbitrator approves an increase in an amount less than the amount noticed, management shall be entitled to the full amount in the interest-bearing account subject to a homeowner credit against future rent. The amount of the credit shall be the difference between the amount deposited in the interest-bearing account and the amount approved, plus a proportional amount of the interest, if any, prorated among the tenancies. Management shall notify each homeowner in writing of the amount of credit.

(c) Where a new maximum rent increase schedule has been set by the board of supervisors upon review or by the arbitrator upon rehearing, adjustments in rent paid shall be made in accordance with subsections (b)(1) and (2) of this section.

184 (10)

No. 10-1125

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

DANIEL GUGGENHEIM, et al.,
Petitioners,

v.

CITY OF GOLETA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Finally, the en banc decision comports with "fairness and justice," the animating principles of the Takings Clause. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Finding a taking on these facts would generate a windfall for Petitioners, who knowingly paid a price befitting a regulated property. That windfall would come at the expense not only of Respondent's taxpaying residents, but also of mobilehome park residents, who invested in their mobilehomes in reliance on rent control.

Mobilehome owners are in a unique position: they make capital investments in their mobilehomes and other improvements but do not own the underlying land. Mobilehomes are, contrary to the name, effectively immobile. Without limits on rent increases, park owners can force mobilehome owners to either accept exorbitant rents or abandon their homes. Writing for the en banc court, Judge Kleinfeld aptly noted that "the owner of the land has the owner of the mobile home over a barrel." Pet. App. at 5a.

If Petitioners' attempt at judicial deregulation were successful, mobilehome owners who purchased their homes at higher prices reflecting the benefit of rent control would bear both a loss in the value of their investment and an increase in rent.

> The people who really do have investment-backed expectations that might be upset by changes in the rent control system are tenants who bought their mobile homes after rent control went into effect. Ending rent control would be a windfall to [Petitioners], and a disaster for tenants who bought their

> mobile homes after rent control was imposed in the 70's and 80's.

Id. at 22a.

The court below correctly applied the *Penn Central* test to conclude there was no taking. This Court should decline Petitioners' invitation to reapply that well-established test.

BACKGROUND

In 1979, Santa Barbara County enacted an ordinance controlling rents charged at mobilehome parks. The ordinance tied annual rent increases to inflation. Pet. App. at 4a-6a. In 1987, the County amended the ordinance to provide that rents charged to a new tenant in a park could not be increased by more than 10 percent of the rent paid by the prior tenant. *Id.* at 5a-6a; *id.* at 27a (Bea, J., dissenting).

The property at issue has been used as a mobilehome park since long before Petitioners acquired it. The prior owners of the property never challenged the 1979 ordinance or the 1987 amendment. *Id.* at 138a (Kleinfeld, J., dissenting from panel op.).

In 1997, Petitioners purchased the property and continued to operate it as a mobilehome park. *Id.* at 6a. They too never challenged the County ordinance. *Id.* at 16a. In 2002, Respondent City of Goleta was incorporated as a new city from unincorporated territory in the County, including Petitioners' property. *Id.* at 6a.

Upon incorporation, the city council of a new city must adopt, as its first official action, an ordin-

ance "providing that all county ordinances previously applicable shall remain in full force and effect as city ordinances for a period of 120 days after incorporation." Cal. Gov't Code § 57376(a); *see also* Pet. App. at 6a-7a.

As that statute dictated, Respondent's city council voted on February 2, 2002 to continue all of the County's ordinances, including the mobilehome rent control ordinance, for 120 days. Pet. App. at 7a. Then, within the 120-day period, on April 22, the city council readopted without change all of the County ordinances, again including the mobilehome rent control ordinance, as ordinances of the new City of Goleta.[1] *Id.*

Petitioners filed suit in district court challenging, on their face, Respondent's actions to continue the County ordinance. *Id.* at 8a. They did not challenge the County's 1979 enactment or 1987 amendment and did not join the County as a party. *Id.* at 16a. Petitioners alleged, among other claims, that the 2002 ordinance caused an uncompensated taking under the "fails to substantially advance legitimate state interests" test set out in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), and under the *Penn Central* test. Resp. App. at 2-3.

The district court granted summary judgment to Petitioners on the *Agins* claim (Pet. App. at 142a-147a), but vacated the judgment after this Court re-

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[1] Respondent's two identical ordinances are hereinafter referred to collectively as the "2002 ordinance."

pudiated that test in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). *See* Resp. App. at 2-3. After further proceedings, the court denied Petitioners' motion for summary judgment on the *Penn Central* claim,[2] and shortly thereafter entered an order to show cause why the court should not grant judgment to Respondent. After briefing and argument, the court entered judgment for Respondent, and Petitioners appealed. Pet. App. at 9a; *id.* at 64a-67a (panel op.).

In a split decision, a three-judge panel of the Ninth Circuit reversed, concluding that Petitioners had shown a taking under *Penn Central*. *Id.* at 56a-132a (panel op.). In dissent, Judge Kleinfeld argued that Petitioners had not been harmed by Respondent's reenactment of the County's longstanding ordinance. *Id.* at 132a-141a (Kleinfeld, J., dissenting from panel op.). Respondent sought rehearing en banc, and an 11-judge en banc panel reconsidered the case. *See* 9th Cir. R. 35-3.

The en banc court affirmed the district court in an 8-3 decision. Pet. App. at 1a-25a. Judge Kleinfeld, now writing for the majority, reprised his earlier dissent. Applying the *Penn Central* factors, the court held that Petitioners had suffered no taking.

This petition followed.

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[2] Petitioners did not include this order in the appendix to the petition. Respondent has accordingly included it in the appendix to this brief. Resp. App. at 1-24.

REASONS TO DENY THE PETITION

I. The En Banc Court Faithfully Applied This Court's *Penn Central* Test to Find There Was No Taking on These Unusual Facts.

Petitioners repeatedly characterize the en banc decision as adopting a per se rule that a takings claimant cannot prevail if he or she had notice of the challenged regulation. Pet. at 2, 6, 8, 14-15, 17, 21, 23, 24. On the contrary, the court faithfully performed the analysis required by this Court in *Penn Central* and determined that the challenged 2002 ordinance did not, on its face, take Petitioners' property.

1. In *Penn Central*, this Court instructed that the Takings Clause demands an "ad hoc, factual inquir[y]" to determine whether a challenged regulation "goes too far" and thus effects an uncompensated taking of private property. 438 U.S. at 124; *see also Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Court identified three factors to guide that inquiry. "Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Lingle*, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124). The "character of the governmental action" is also relevant. *Id.* at 539.

In the years since *Penn Central*, this Court has emphasized that the case supplies the "polestar" for assessing whether a regulatory taking has occurred. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring), *quoted in Tahoe-Sierra Pres. Council v. Tahoe Reg'l*

Planning Agency, 535 U.S. 302, 326 n.23 (2002); *see also Lingle*, 544 U.S. at 539. The purpose of the *Penn Central* analysis is to determine whether the regulation so severely impairs the use or value of private property that it may properly be considered the functional equivalent of an exercise of eminent domain. *Lingle*, 544 U.S. at 539.

2. Contrary to Petitioners' contention (Pet. at 25), the en banc court did apply *Penn Central*. In doing so, it found that the City's 2002 ordinance did not, on its face, take Petitioners' property. Pet. App. at 17a-23a. The court began with *Penn Central's* primary factors: the 2002 ordinance's insubstantial economic impact on Petitioners and their lack of "distinct investment-backed expectations." *Id.* at 18a; *see Lingle*, 544 U.S. at 538-39.

Petitioners' facial claim challenged Respondent's enactment of the 2002 ordinance, not the County's 1979 or 1987 enactments. Pet. at 3; Pet. App. at 17a-18a; Pet. App. at 36a-38a & n.10 (Bea, J., dissenting). Indeed, a facial challenge to the County ordinance would clearly be time-barred, because such a challenge attacks "mere enactment" of the regulation, and both prior ordinances had been enacted at least ten years before Petitioners purchased the property. Pet. App. at 17a; *see Va. Surface Min. & Reclamation Ass'n*, 452 U.S. at 295 (holding that on a facial claim the court asks "whether the 'mere enactment' of the [challenged regulation] constitutes a taking"); *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (holding that a facial claim accrues "the moment the challenged regulation or ordinance is passed").

Like the en banc dissent, Petitioners elide the crucial distinction between the County's and Respondent's ordinances. Pet. at 26-27; Pet. App. at 29a-33a (Bea, J., dissenting). Petitioners have advanced two theories of the rent control program's economic impact on them, but both are based on the effect of the County ordinance, not the ordinance that Petitioners have challenged.

First, Petitioners argue that "the Ordinance" transferred wealth from mobilehome park owners to mobilehome owners because mobilehome owners can sell their regulated mobilehomes for more than they could without regulation. Pet. at 26; Pet. App. at 31a-32a (Bea, J., dissenting). But Respondent's reenactment of the existing County ordinance did not cause such a transfer. Assuming it occurred, "[t]hat transfer occurred in 1979 and 1987, from other landlords, and probably benefitting other tenants." Pet. at 22a. There is no evidence that the *2002 ordinance*, the "mere enactment" of which is challenged here, transferred any wealth from Petitioners to anyone else. At worst, the ordinance failed to transfer that wealth anew to Petitioners.

Second, Petitioners claim more broadly that no one "dispute[d] that "the Ordinance seriously impacted the value of [petitioners'] property." Pet. at 25 (quoting Pet. App. at 30a (Bea, J., dissenting) (alterations in original)). The choice of language — "the Ordinance" — is deliberately vague. *The County's* "mere enactment" of the 1979 ordinance may have affected the value of what is now Petitioners' property. Indeed, Petitioners paid a lower price for their property as a result. Resp. App. at 7-8; *see also* Pet. App. at 14a, 18a, 19a, 21a-22a. But *Respondent's*

2002 ordinance had no comparable effect. Respondent could not take what Petitioners claim was previously taken by the County. Petitioners have submitted no evidence that the 2002 ordinance caused any change whatsoever in the value of their property. *See* Pet. App. at 18a. That is the appropriate measure of economic impact. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492-93 (1987) (finding that "petitioners have also failed to make a showing of diminution of value sufficient" to show a taking); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) (holding that "comparison of values before and after [enactment of a regulation] is relevant" to "determine where regulation ends and taking begins").

In fact, the evidence that Petitioners did submit did not address the market value of their real property. They quote the dissent's erroneous statement that Petitioners "presented evidence that the Ordinance deprives them of 80% of the market value of their mobile home park land." Pet. at 25 (quoting Pet. App. at 30a (Bea, J., dissenting)). On the contrary, the evidence showed only that the mobilehome space *rents* controlled by the ordinance were below prevailing market *rents* for comparable spaces. Resp. App. at 6-7.

In sum, the economic impact of rent control on Petitioners' property, however measured, was a fait accompli before they made any investment in the property in 1997. The "mere enactment" of Respondent's ordinances in 2002 did nothing to affect the value of Petitioners' property.

The en banc court also correctly concluded that Petitioners had no reasonable investment-backed expectation of unregulated use of the property. Pet. App. at 19a. In 1997, when Petitioners purchased the property, the program had been in effect for nearly 20 years, and Respondent would not incorporate and adopt the 2002 ordinance for five more years. They made no investment in reliance on being able to operate the park unencumbered by rent control.

Petitioners, like the dissent, argue they had an expectation of potentially freeing the property of its restrictions. Pet. at 26; Pet. App. at 39a-41a (Bea, J., dissenting). But this Court has never suggested that a plaintiff's dream of challenging a regulation as a taking is sufficient to form reasonable investment-backed expectations to support a claim that the regulation is a taking. To be sure, "[s]ome circularity must be tolerated in these matters." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring). But Petitioners' argument is not merely circular; it is a swirling logical vortex that would swallow the expectations factor whole. Any claimant could allege the "expectations" so important to a takings claim simply by asserting his hope of prevailing on a takings claim — the impact of the regulation on the claimant's investment would be irrelevant.[3] The Court could not have intended that

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[3] The Petition and the en banc dissent are devoid of discussion of the impact of the challenged regulation on Petitioners' investment.

this "particularly" important factor would be so insubstantial. *Penn Central*, 438 U.S. at 124.

Finally, the en banc court concluded that the "character of the government action" undermined Petitioners' claim, because the 2002 ordinance only continued a long-existing regulation. Pet. App. at 18a, 21a. The "character" of the rent control program's effect on property is markedly different from those that this Court has previously found so probative of a taking. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987) (prohibition of devise); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (physical occupation); *Penn Central*, 438 U.S. at 124 (same); *see also Yee v. City of Escondido*, 503 U.S. 519, 527-29 (1992) (mobilehome rent control regulation did not cause a physical taking). Rather, this case is closer to *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). In applying the character factor in that case, the Court found that the challenged regulation "adjust[ed] the benefits and burdens of economic life to promote the common good" by protecting participants in multi-employer retirement plans from the financial impacts of withdrawing employers on those participants. *Id.* at 225.

The rent control program here similarly "adjusts the benefits and burdens" in a commercial relationship, protecting mobilehome park tenants from the market power wielded by park owners in the absence of regulation:

> the purpose of the ordinance . . . is not just to lower rents, but to "alleviate the hardship" to mobile home owners caused by "the high cost of moving mobilehomes, the po-

QUESTION PRESENTED

In 1997, Petitioners purchased a mobilehome park subject to Santa Barbara County's 1987 mobilehome rent control ordinance. In 2002, the newly incorporated City of Goleta, in which Petitioners' park is located, adopted the County's ordinance without alteration.

Did the Ninth Circuit, en banc, err in concluding under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), that the City's 2002 adoption, on its face, did not take Petitioners' property because it had no impact on the value of Petitioners' property or their investment-backed expectations?

> tential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes." . . . *It protects owners of mobilehomes from the leverage owners of the pads have, to collect a premium reflecting the cost of moving the mobile home on top of the market value of use of the land.*

Pet. App. at 23a-24a (emphasis added) (quoting Goleta Municipal Code § 08.14.010); *see* Pet. App. at 159a (Santa Barbara County Code § 11A-1); *cf. Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) ("Indeed, a primary purpose of rent control is the protection of tenants.").

Petitioners, like the dissent, contend that the character factor supports Petitioners, because the ordinance allegedly "fails to achieve its stated purpose." Pet. at 26 (citing Pet. App. at 43a-44a (Bea, J., dissenting)). This argument charges headlong into this Court's holding in *Lingle* that rejected that sort of means-ends analysis as inconsistent with the basic purpose of the Takings Clause: "whether a regulation of private property is *effective* in achieving some legitimate public purpose . . . is not a valid method of discerning whether private property has been 'taken.'" 544 U.S. at 542 (emphasis in original).

In sum, the en banc court dutifully performed the "ad hoc, factual inquir[y]" that this Court has identified as the paramount benchmark for deter-

mining whether regulation has caused a taking. *Tahoe-Sierra*, 535 U.S. at 326 & n.23.

II. The Challenged Decision Is Consistent with *Palazzolo*.

The en banc court's *Penn Central* analysis belies Petitioners' contention that the court flouted the holding of *Palazzolo* by adopting a per se bar for claimants with notice of a challenged regulation. *See* Pet. at 14-16.

In *Palazzolo*, the Rhode Island Supreme Court had adopted just such a rule. It had held that a property owner who acquired property with notice of the challenged regulation could never challenge that regulation as an uncompensated taking. 533 U.S. at 616, 626. The Court rejected that "blanket rule," which it found to be "too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 628. Language throughout the opinion demonstrates that the Court's concern was with the Rhode Island court's absolutism. *See id.* at 626 (rejecting the "sweeping[] rule" that "[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking"); *id.* at 627 (rejecting "the State's rule" under which "the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable"); *see also id.* at 632 (O'Connor, J., concurring) (describing the decision as rejecting "the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim"); *id.* at 636 ("The

temptation to adopt what amount to *per se* rules in either direction must be resisted.").

The en banc court here adopted no "blanket rule." Rather, as just described, it concluded that none of the *Penn Central* factors supported finding a facial taking *on these facts*.

Moreover, the court acknowledged that Petitioners could still bring an as-applied challenge if they sought a rent adjustment and claimed that Respondent's decision on that application caused a taking. Pet. App. at 16a & n.37. The court held, "It is not as though an unconstitutional law becomes immunized from all challenges once limitations bar facial challenges to its enactment." *Id.* at 17a. Had the court intended to categorically prohibit post-enactment claims, it would have barred Petitioners from bringing an as-applied challenge as well.

The en banc court did emphasize that the preexistence of the rent control program meant that Petitioners lacked investment-backed expectations of unregulated use, but that was hardly improper. Although *Palazzolo* rejected a categorical defense based on notice of regulation, it did not prohibit courts from considering the timing of the claimant's acquisition in applying the *Penn Central* factors. The Court did not apply those factors at all, but rather remanded for that purpose. 533 U.S. at 632. On the other hand, all of the separate opinions in the case, except for Justice Scalia's concurrence, *id.* at 637 (Scalia, J., concurring), acknowledged that the timing of acquisition could be relevant in a *Penn Central* analysis. *See id.* at 635-36 (O'Connor, J., concurring); *id.* at 643 n.6 (Stevens, J., concurring in part and dissenting in

part); *id.* at 654 n.3 (Ginsberg, J., dissenting); *id.* at 655 (Breyer, J., dissenting).

> In particular, Justice O'Connor emphasized that
>
> > our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. . . . Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred.

Id. at 635-36 (O'Connor, J., concurring); *see also id.* at 633 ("[I]nterference with investment-backed expectations is one of a number of factors that a court must examine[, and] the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.").

In applying the expectations factor, the en banc court did not imply that post-enactment claimants are categorically barred from bringing a claim. Petitioners' claim failed not just because they had notice of the rent control restrictions when they bought the property, but also because they were not harmed by the subsequent reenactment they challenged — their investment was worth the same before Respondent's enactment as it was after. The facts, not per se rules, dictated the result.

III. The Challenged Decision Is Consistent with the Lower Courts' Decisions Since *Palazzolo*.

Because the en banc decision does not categorically bar claimants with notice of a challenged regulation, there is no conflict between this decision and those of other federal and state courts after *Palazzolo*.

1. Petitioners cite several cases that allegedly conflict with the en banc decision. Pet. at 18-23. On the contrary, like the en banc decision, the cited cases recognize that the timing of acquisition is relevant to the *Penn Central* analysis.

The Federal Circuit's case law, which Petitioners emphasize (Pet. at 18-20), holds that "the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (in banc) (citing *Palazzolo*, 533 U.S. at 632-34 (O'Connor, J., concurring)); *see also Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (notice of even *potential* regulation is relevant to reasonable investment-backed expectations); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1351 (Fed. Cir. 2001). Similarly, the court in *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), *cited in* Pet. at 18-19, remanded a takings claim for a full *Penn Central* analysis and instructed that "Schooner Harbor's knowledge of the regulation . . . is a factor that may be considered" in assessing its reasonable investment-backed expectations. *Id.* at 1366.

Petitioners' state court decisions also yield no conflict. They recognize that a plaintiff's pre-acquisition notice of a regulation does not absolutely bar a takings claim, *see State ex. rel. Shemo v. Mayfield Heights*, 765 N.E.2d 345, 352 (Ohio 2002); *Stansbury v. Jones*, 812 A.2d 312, 327 (Md. 2002); *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 793 A.2d 545, 548 (Md. 2002), but *is* relevant in evaluating investment-backed expectations, *see State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm'rs*, 875 N.E.2d 59, 67-68 (Ohio 2007); *Wensmann Realty, Inc. v. City of Egan*, 734 N.W.2d 623, 638 (Minn. 2007); *Cottonwood Farms v. Bd. of Cnty. Comm'rs*, 763 P.2d 551, 558 (Colo. 1988).

Finally, Petitioners' alleged "intra-state split of authority" in California does not exist. *See* Pet. at 22. The unpublished decision in *Mehling v. Town of San Anselmo,* No. A102563, 2004 WL 1179428 (Cal. App. 1st Dist. May 28, 2004),[4] only found that a post-enactment purchaser was not barred from asserting a categorical takings claim. *Id.* at *6. Petitioners do not assert a categorical claim (Pet. at 9), and the en banc court adopted no categorical bar. Furthermore, because the court emphasized that its decision would not preclude Petitioners from challenging application of the ordinances (Pet. App. at 16a-17a; *see also supra* Section II), the decision is also consistent with

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[4] Petitioners improperly rely on an unpublished decision of the California Court of Appeal. *See* Cal. R. Ct. 8.1115 ("[A]n opinion of a California Court of Appeal . . . that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.").

the California Supreme Court's holding that the statute of limitations did not preclude a plaintiff from challenging provisions of an ordinance when the ordinance was applied to the plaintiff. *See Travis v. Cnty. of Santa Cruz*, 94 P.3d 538, 545 (Cal. 2004).

2. Petitioners also omit other post-*Palazzolo* cases that echo the en banc court's finding that post-regulation investment is relevant to the reasonableness of a plaintiff's expectations.

In *Raceway Park, Inc. v. Ohio*, 356 F.3d 677 (6th Cir. 2004), the Sixth Circuit rejected a challenge to rules governing the distribution of gaming revenues because "the plaintiffs were well aware of the . . . Rule prior to making any investments related to simulcast-only racing, and could not, therefore have reasonably expected a greater return." *Id.* at 685. Likewise, the D.C. Circuit found that a rule limiting ownership of multiple local television stations did not interfere with broadcasters' reasonable expectations because the Federal Communications Commission had warned of the possible limitations in prior notices of proposed rulemaking. *Sinclair Broad. Group, Inc. v. F.C.C.*, 284 F.3d 148, 167 (D.C. Cir. 2002).

The Supreme Court of Connecticut reached a similar conclusion when a water supply company purchased a property long used as a well lot and then continued to use the property for that purpose for 20 years before challenging its zoning. *Rural Water Co., Inc. v. Zoning Bd. of App. of Town of Ridgefield*, 947 A.2d 944, 956 (Conn. 2008); *cf. Gove v. Zoning Bd. of App. of Chatham*, 831 N.E.2d 865, 874 (Mass. 2005) (property owner who admitted having no expectation of developing a restricted coastal par-

cel could not subsequently claim a taking when such development was disapproved). And the Supreme Court of Montana denied a *Penn Central* claim because the "publicly known and very controversial" risks associated with alternative game ranches and the "regulative and speculative nature of the industry . . . play[ed] a significant role in determining whether . . . investment-backed expectations [were] 'reasonable.'" *Buhmann v. Montana*, 201 P.3d 70, 92-39 (Mont. 2008).

State intermediate appellate courts, including courts in California, have also concluded that knowledge of regulation is a relevant consideration in a *Penn Central* analysis. *See Shaw v. County of Santa Cruz*, 88 Cal. Rptr. 3d 186, 224 (Cal. App. 1st Dist. 2008) ("whether the landowner had constructive knowledge of the regulation when choosing to improve the property" relevant to expectations); *see also K & K Const., Inc. v. Dep't of Envtl. Quality*, 705 N.W.2d 365, 382 (Mich. Ct. App. 2005); *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 490 (Tex. App. 2004).

In sum, the en banc decision created no conflict with the takings decisions of other lower courts in the wake of *Palazzolo*. There is thus no split of authority for this Court to resolve.

IV. Certiorari Is Inappropriate to Reconsider Whether "Fairness and Justice" Indicate a Taking.

At bottom, Petitioners are simply dissatisfied with how the en banc court applied the *Penn Central* factors to the facts. But certiorari is hardly appropriate to reapply this firmly established test. *See* Sup.

Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Indeed, the Court has only sparingly reviewed applications of *Penn Central*.

The Court's apparent reluctance to review takings cases applying *Penn Central* is understandable because the test requires the ad hoc application of several factors to achieve the "fairness and justice" that are the goals of takings analysis. *Palazzolo*, 533 U.S. at 617-18 (quoting *Armstrong*, 364 U.S. at 49). Those considerations do not point to a taking on the facts of this case. Quite the contrary, finding a taking under these circumstances would be manifestly *unfair*, giving Petitioners a windfall at the expense of innocent mobilehome park tenants.

Given the Court's emphasis of fairness, it would be surprising to learn that the Takings Clause allows claimants to realize windfall profits. *See id.* at 635 (O'Connor, J., concurring) ("[I]f existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost."). *But cf. id.* at 636-37 (Scalia, J., concurring) (concluding that takings claims may result in a claimant's windfall). It is hardly a remedy for the government's having "forc[ed] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" to compensate people who have not borne those burdens. *Armstrong*, 364 U.S. at 49.

Petitioners would receive such a windfall if they were to prevail. They paid a price for their property

that reflected the existing regulation and suffered no loss when Respondent continued that regulation. By contrast, the owner of the property when the regulation was enacted by the County and its economic impact was felt on the property is not before the Court and stands to gain nothing from a judgment.

Nor would Petitioners' windfall come solely at the government's expense. *See Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) (government should not benefit from a taking from a prior landowner). If Respondent were ordered to compensate Petitioners, Respondent would be compelled to rescind its ordinance rather than pay the damages demanded by mobilehome park owners. As a result, wholly innocent parties — the numerous mobilehome owners who purchased their mobilehomes after the County adopted the program — would bear the brunt of Petitioners' claim. They have invested in their mobilehomes in reliance on rent control and therefore have paid more than they would have paid for uncontrolled mobilehome spaces. Pet. App. at 22a-23a; Resp. App. at 7. If the program were found to cause a taking, these owners would suffer a debilitating one-two punch: their capital investments would be devalued and their rents would be increased. In sum, as the en banc court aptly put it, these are "[t]he people who really do have investment-backed expectations that might be upset by changes in the rent control system." Pet. App. at 22a.

Finally, the burden of Petitioners' windfall would entirely miss the County, which originally enacted the program and therefore caused any alleged harm to Petitioners. Like the prior landowner, the County is not before the Court.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

BACKGROUND 4

REASONS TO DENY THE PETITION 7

I. The En Banc Court Faithfully Applied This Court's *Penn Central* Test to Find There Was No Taking on These Unusual Facts. 7

II. The Challenged Decision Is Consistent with *Palazzolo*. 14

III. The Challenged Decision Is Consistent with the Lower Courts' Decisions Since *Palazzolo* 17

IV. Certiorari Is Inappropriate to Reconsider Whether "Fairness and Justice" Indicate a Taking. 20

CONCLUSION 23

In sum, this case involves neither the proper plaintiff nor the proper defendant. Finding a taking in this unusual situation would cause injustice, not remedy it.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL GUGGENHEIM; SUSAN GUGGENHEIM; AND MAUREEN H. PIERCE, Plaintiff, vs. CITY OF GOLETA, Defendant.	Case No. CV 02-2478 FMC (RZx) **ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment (docket #122). The Court has read and considered the moving, opposition, and reply documents submitted in connection with this Motion. The matter was heard on April 3, 2006, at which time the parties were in receipt of the Court's tentative Order. For the reasons set forth below, the Court denies Plaintiffs' Motion.

I. Background

A. Nature of the Action

This action arises out of a mobile home rent-control ordinance in the City of Goleta.

B. Procedural History

This action has a lengthy procedural history, which may be briefly summarized as follows:

At the pleadings stage, the Court considered whether the present action was barred by the statute of limitations. Ultimately, the Court resolved that question in favor of the Plaintiffs. However, the Court declined to exercise jurisdiction over the related state-law claims, and because related state-law claims could possibly negate the need to determine constitutional questions presented by the current action, the Court stayed the action pending a state court's resolution of those claims. The parties eventually settled the state-law claims; as part of the settlement, the Defendant City of Goleta ("the City") is barred from challenging the Court's ruling on the statute of limitations issue. As a result of termination of the state-court proceedings, the Court lifted the stay in this action.

At the summary judgment stage, the Court held that the rent-control ordinance was an unconstitutional taking in violation of the Fifth and Fourteenth Amendments; therefore, the Court invalidated the challenged ordinance.[1] In reaching its holding, the Court was bound by Ninth Circuit precedent that held unconstitutional a similar mobile home rent-control

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[1] Because the Court held the ordinance invalid under the Takings Clause, the Court did not address Plaintiffs' due process and equal protection challenges.

ordinance. The Court (in this case) and the Ninth Circuit (in *Cashman*)[2] held that the ordinance was unconstitutional because it did not "substantially advance" its stated purpose – essentially, to provide lower cost housing to mobile home owners. To "substantially advance" the stated purpose of the law, the Ninth Circuit had held that the challenged law must actually be effective at remedying what the legislature intended upon remedying. *Id.*

The evidence before this Court was uncontroverted: the presence of the ordinance and market forces resulted in a premium on the sale of mobile homes. Therefore, in accordance with *Cashman,* the Court held that the premium on sale rendered the ordinance ineffective.

However, after the Court entered Judgment, and while this case was pending on appeal, the Supreme Court granted review of an unrelated Ninth Circuit case and invalidated the "substantially advances" test. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 2085 (2005). In light of *Lingle*, the parties agreed that the appeal should be dismissed and the Court's judgment and summary judgment order should be vacated.

On motion of the parties, the Court allowed a period of additional discovery and set deadlines for

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[2] *Cashman v. City of Cotati*, 374 F.3d 887, 890 (9th Cir. 2004)

the filing of dispositive motions. The present Motion was filed in accordance with the schedule set by the Court.

C. Uncontroverted Facts

The Plaintiff purchased Rancho Mobile Estates Mobilehome Park ("the Park") in Santa Barbara County in an area that is now part of the City of Goleta, California, in 1997. At the time and since approximately 1987, the County of Santa Barbara had a mobile home rent-control ordinance ("the RCO") in place for unincorporated areas of the County. The Park was subject to the RCO while the Park was in the unincorporated area. In 2002, the City adopted the RCO as part of a generalized adoption and subsequent re-adoption of the Santa Barbara County Code when the City was created. *See* Cal. Gov't Code § 57376 (requiring newly incorporated cities to adopt an ordinance providing that all county ordinances shall remain in force for 120 days or until the city council has enacted ordinances superseding the county ordinances).

The express purpose of the RCO is set forth in the City Code:

> A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who

> reside in rental housing. These conditions endanger the public health and welfare of the County of Santa Barbara. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobilehome parks in the County of Santa Barbara. Because of such factors and the high costs of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobilehome park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by imposing rent controls in mobilehome parks within the unincorporated area of the county of Santa Barbara.

Goleta City Code, § 11A-1.

Within the City of Goleta, only owners of mobile home parks are subject to rent-control ordinances, owners of other types of properties are not subject to rent-control ordinances.

The RCO limits any increase in rents to the Park on an annual basis to 75% of the increase in the Consumer Price Index ("CPI") or 5%, whichever is less. This allowable annual increase is referred to as the "automatic increase." *See* Goleta City Code, § 11A-5(g). The RCO contains a "vacancy control" provision, which prevents the Park from raising rents to the market rate when a mobile home is sold and a new resident moves into the Park. However, the RCO allows a total rent increase of up to 10% on vacancy over any four-year period.

The RCO has a complex a "discretionary rent increase" provision. The park owner must give the mobile home owner a notice of the increase in rent if the increase exceeds 75% of the CPI. Goleta City Code § 11A-5(a)(2). The park owner must itemize amounts for increased operating costs, capital expenses incurred in the prior year, capital expenses incurred in the prior year that have not been fully reimbursed, and capital improvements. *Id.* at 11A-5(a)(3)(A). Homeowners may file a petition for a hearing to protest the proposed increase. *Id.* at 11A-5(b). An arbitrator may allow a discretionary rent for "increased costs where increases in expenses and expenditures justify such increase." *Id.* at 11A-5(h). In doing so, the arbitrator must consider evidence of "all relevant factors", which "may include, but is not limited to" such factors such as increases in operating expenses, insurance, repairs, taxes, capital expenses, capital improvements, and increases in amenities. *Id.* at 11A-5(f)(1). Increases in the amounts of principal

and interest paid on loans and depreciation may not be not considered by the arbitrator. *Id.*

Housing costs in the City increased approximately 205% from 1997 to 2003, and increased another 21.1% in 2004. The rent on the rent-controlled spaces in the Park have not kept up with the increase in housing costs.

Based on a sample of mobile home space rentals in the Park that were examined by Plaintiff's expert, the rent actually charged by Plaintiffs represent a 76.75% to 78.5% discount over the market rate. The RCO has resulted in what is known as "transfer premiums" in the sale of mobile homes.[3] These transfer premiums constitute approximately 90% of the sale price of mobile homes in the Park. No provision in the RCO prevents the seller of a mobile home from capturing transfer premiums.

At the time it adopted the RCO, the City make no findings regarding the need for a RCO in the City.

The City's expert offers the following uncontroverted opinions: 1) The RCO was in effect when Plaintiffs purchased the Park; therefore, the purchase price of the Park would have had factored in the lower anticipated income that would be derived from

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[3] The City purports to dispute this fact, citing its own expert report. However, the City has failed to provide a pinpoint citation to the thirty-page report; therefore, the Court treats this fact as undisputed.

the property. *See* Thomsen Report, Ex. B to Opposition. In other words, the anticipated reduction in income from the property that would be a result of the RCO was reflected in the purchase price of the Park, and the purchase price would have been higher had the property not been subject to any such restrictions. 2) The rate of return on investment in the property is comparable to that of other real estate investments. *Id.* 3) The value of Plaintiffs' property has appreciated significantly over the past several years, and Plaintiffs have refinanced the property on two occasions, increasing the loan amount on the property from $1.9 million to $3 million and then from $2.8 million to $3.7 million, resulting in $1.8 million in cash distributions to equity holders. *Id.*

D. The Present Motion

Plaintiffs' Motion seeks summary judgment as to their claims based on the Takings Clause, the Due Process Clause, and the Equal Protection Clause. As to the takings claim, Plaintiffs argue that the RCO has effected a taking of private property for public use without just compensation in two ways: First, Plaintiffs argue there has been a taking because the RCO has the effect of requiring Plaintiffs to provide a rent subsidy equal to approximately 80% of the fair market value of the rent. Second, Plaintiffs argue that the RCO has the effect of transferring the value of the Park to the mobile home owners by virtue of the creation of a premium, equal to approximately

90% of the sale price, on the sale of the mobile homes that are located in the Park.

As to the due process claim, Plaintiffs argue that the RCO violates due process in two ways. First, Plaintiffs argue that the RCO is unconstitutional under the "traditional" substantive due process analysis in that the RCO is not rationally related to any legitimate state purpose. Second, Plaintiffs argue that the RCO does not permit them to earn a just and reasonable return.

As to the equal protection claim, in their final argument, Plaintiffs contend that the RCO unfairly singles out Plaintiffs to bear the burden of providing low-cost housing.

Plaintiffs make only facial challenges to the RCO. *See* Motion at 1 ("The City's mobilehome rent control ordinance is facially unconstitutional for four separate reasons.") A facial challenge claims "that the mere enactment of a statute constitutes a taking," but an as-applied challenge claims "that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1051 (9th Cir. 2004) (internal quotation marks and citation omitted).

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon,
447 U.S. 255 (1980).....5

Appolo Fuels, Inc. v. United States,
381 F.3d 1338 (Fed. Cir. 2004).....17

Armstrong v. United States,
364 U.S. 40 (1960).....3, 21

Buhmann v. Montana,
201 P.3d 70 (Mont. 2008).....20

Commonwealth Edison Co. v. United States,
271 F.3d 1327 (Fed. Cir. 2001).....17

Connolly v. Pension Benefit Guaranty Corp.,
475 U.S. 211 (1986).....12

Cottonwood Farms v. Bd. of Cnty. Comm'rs,
763 P.2d 551 (Colo. 1988).....18

Goldblatt v. Hempstead,
369 U.S. 590 (1962).....10

Gove v. Zoning Bd. of App. of Chatham,
831 N.E.2d 865 (Mass. 2005).....19

Hodel v. Irving,
481 U.S. 704 (1987).....12

II. Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Pro. 56(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248, 106 S.Ct. 2505.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989).

The Court construes all evidence and reasonable inferences drawn therefrom in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir. 1995).

III. Takings Claim

A. *Lingle*

The *Lingle* case, which led the parties to dismiss the appeal of the Court's prior summary judgment Order, provides the framework whereby the Court must analyze Plaintiffs' takings claim. In *Lingle*, the Supreme Court invalidated the "substantially advances" test, but reaffirmed other tests used by courts to determine whether a taking has occurred. The Supreme Court first noted that *per se* takings occur where a property owner suffers a permanent physical invasion of her property and where a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e] of her property.'" *Lingle*, 125 S. Ct. 2081 (citing *Loretto v. Teleprompter Manhattan CATC Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982) and quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886 (1992)).

The Supreme Court also noted that a taking could occur in a "land-use" exaction situation, i.e., where the government conditioned the granting of a development permit on the dedication of an easement to the public by the property owner. *Lingle*, 125 S. Ct. at 2086 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994)). A taking occurs in such a situation where the dedication of private property is not "roughly proportional . . . to the impact of the proposed development."

Lingle, 125 S. Ct. at 2086 (citations and alteration marks omitted).

Where the governmental action complained of is neither in the category of *per se* takings nor the category of land-use exactions, it is subject to the *Penn Central* balancing test, which the Supreme Court reaffirmed in *Lingle*. *See Lingle*, 125 S.Ct. at 2081-82, citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978). Under the *Penn Central* test, "several factors . . . have particular significance," including "[t]he economic impact of the regulation," the "character of the governmental action", and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle*, 125 S. Ct. at 2081-82.

In developing the framework by which to analyze regulatory takings claims, the Supreme Court has attempted to "identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain." *Id.* at 2082. Therefore, where a regulation completely eliminates a property's value, a taking has occurred. *Id.* Similarly, the *Penn Central* test focuses on "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.*

B. *Penn Central* Test

Therefore, with this in mind, the Court considers whether Plaintiffs are entitled to summary judgment

under the *Penn Central* test, and pays particular attention to the three factors enunciated therein.

1. Economic Impact

The first factor is "[t]he economic impact of the regulation." On this factor, the evidence is uncontroverted, but mixed. On the one hand, Plaintiffs have offered evidence that the rent actually charged by Plaintiffs represent a 76.75% to 78.5% discount over the market rate. This means that a space that would, in the absence of the RCO, rent for $1,000, rents for an average of only $215 to $232 with the RCO. Plaintiffs have also offered evidence that the RCO has resulted in transfer premiums that average approximately 90% of the sale price of mobile homes in the Park. Plaintiffs argue that this results in a transfer of the value in the property from them to the mobile home owners, as reflected in the inflated prices at which they sell their mobile homes.

On the other hand, the City has offered evidence that the rate of return on investment[4] on the property is comparable to that of other real estate investments. Moreover, the City has offered evidence that the value of Plaintiffs' property has appreciated significantly over the past several years.

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[4] This rate of return is discussed as a ratio of operating income to investment amount.

Considering all this evidence, a reasonable inference that may be drawn is that although Plaintiffs have received a rate of return on investment comparable to other real estate investments, and although they have enjoyed a significant appreciation in value of their property, Plaintiffs could have received higher rates of return in the absence of the RCO.

2. Character of the Governmental Action

The second factor the Court must consider is "the character of the governmental action." In *Penn Central*, the Supreme Court elaborated on this factor, stating that

> [a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. at 124. Here, the stated purpose of the RCO is to protect mobile home owners from exorbitant rent for the spaces upon which their homes are situated. The RCO recognizes the unique position occupied by the mobile home owners (who own the homes but rent the land underneath those homes) due to the cost of moving the mobile homes and placing them on a new space, as well as the

potential damage that can be incurred in moving them. The inference to be drawn from this stated purpose is that mobile home owners, having placed an expensive-to-move home on land rented from the property owner, is in a uniquely vulnerable bargaining position when a lease on land is up for renegotiation. The character of this action is therefore less like a physical invasion and more like an "adjust[ment to] the benefits and burdens of economic life to promote the common good."

Plaintiffs argue that the current effect of the RCO is to impose rent levels that are unreasonably low and that the resulting premium on sale has transferred the value of the land from the Park owners to the mobile home owners through the creation of the premium on sale of the mobile homes. In support of their argument that this caused an unconstitutional taking, Plaintiffs rely on *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), which held that local entities may not adopt regulations that are designed to favor a particular private property, even though the regulations are justified by a pretextual public purpose. In *Armendariz*, the plaintiffs contended that the city enforced the housing code in an unconstitutional manner in order to deflate the value of the plaintiffs' property and to allow for commercial redevelopment of the land. *Armendariz*, 75 F.3d at 1326. Specifically, Plaintiffs here argue that "the overwhelming impact and only conceivable purpose advanced by the City in adopting the Ordinance was to facilitate the transfer of the underlying

real property from the park owner to tenant, resulting in a private taking." In this case, unlike the *Armendariz* case, there is absolutely no evidence that the stated reason for the RCO is pretextual and that the actual reason for maintaining the RCO is to allow for a transfer of the value of property from the Park owners to the mobile home owners. Accordingly, there is no evidence that supports Plaintiffs' contention that the character of the governmental action is suspect; rather, the evidence points to an adoption of a county ordinance along with an adoption of the county ordinance's express purpose as part of a blanket adoption by a new city of the county's ordinance as required by Cal Gov't Code § 57376.

Plaintiffs also argue that the RCO unfairly singles them out to contribute to providing low-cost housing in a way that other landowners are not required to contribute. Plaintiffs rely on the test for determining whether a taking has occurred in a land-use exaction situation and argue that their contribution is not "proportional" as required by *Nollan* and *Dolan*. However, in *Lingle*, the Supreme Court made no suggestion that elements of the various tests regarding takings (*per se* tests, *Penn Central* test, and the *Nollan/Dolan* land-use exaction tests) could be combined in the way suggested by Plaintiffs. Moreover, Plaintiffs' argument ignores the express purpose of the RCO, which is to protect mobile home owners from exploitation due to their unique vulnerability.

On balance, the Court finds nothing sinister in the purpose of the RCO. There is no evidence of the

actual impermissible motive advanced by Plaintiffs. The City is not bound, as it might be in a *Nollan/Dolan* land-use exaction situation to ensure that the benefits to Plaintiffs are roughly proportional to the impact of the development.

3. Interference with Investment-Backed Expectations

This leads the Court to what is, in this particular case, the most significant factor of all – "the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle*, 125 S. Ct. at 2081-82. Here, it is uncontroverted that Plaintiffs purchased the Park while the RCO was in effect.[5] The

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[5] Plaintiffs argue that the Court should not consider this fact and that it should instead consider "the market value of the property unburdened by the regulation being challenged." Reply at 17. Plaintiffs rely on *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001), which held that the acquisition of title by a landowner after the effective date of the challenged law does not preclude a takings challenge. However, the majority's opinion in *Palazzolo* does not go so far as to hold that the possible effect of the challenged law on the value of the property should not be factored into the analysis regarding "the distinct investment-backed expectations." *Compare Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) ("[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.") *with Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) ("In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.") Accordingly, the Court considers how the fact that

(Continued on following page)

Park owners bought the Park subject to the RCO, and the Park has at all times been subject to the RCO.[6] Therefore, the investors' expectations of the value of the Park when purchased, as well as the income to be received from the Park, should have been, at all times, tempered by the knowledge that the RCO would have an adverse effect on their investment. Therefore, there has been no interference with investment-backed expectations.

4. Ruling Re *Penn Central* Test

In considering the *Penn Central* factors, the Court is faced with the task of measuring "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle,* 125 S. Ct. at 2082. Here, the evidence of the rate of return on investment is mixed. Although Plaintiffs have enjoyed a rate of return comparable to

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Plaintiffs knew of the RCO when they purchased the Park should shape their expectations regarding their investment. *See Carpenter v. United States*, 69 Fed. Cl. 718, 732 (Fed. Cl. 2006) ("The Federal Circuit has held that *Palazzolo* did not reject the principle that the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [a plaintiff's] expectations.") (citations and internal quotation marks omitted).

[6] The fact that the RCO was, at the time, a county ordinance is not lost on the Court. Nor is the fact that the RCO was subsequently adopted by the City. The fact remains that the RCO has – for all practical purposes – remained in effect, unchanged in substance, for all times relevant to the present action.

other real estate investments, Plaintiffs' evidence tends to suggest that they would have earned more – perhaps much more – in the absence of the RCO. However, the character of the governmental action is less like a *per se* taking and more like a permissible shifting of economic benefits and burdens. Moreover, its express purpose is to protect a group of consumers whom the legislature believed to be especially vulnerable to exploitation. Most importantly, as explained above, there has been no interference with investment-backed expectations. It appears to the Court that Plaintiffs got exactly what they bargained for when they purchased the Park – a mobile-home park subject to a detailed rent-control ordinance.

Plaintiff's Motion for Summary Judgment as to their takings claim is denied.

IV. Equal Protection Claim and "Traditional" Substantive Due Process Claim

Where a substantive due process claim or equal protection claim is not based on a suspect classification and where a fundamental right is not implicated, government action is unconstitutional only when it is irrational, arbitrary, or malicious. *Nelson v. City of Irvine*, 143 F.3d 1196, 1205 (9th Cir. 1998) (equal protection); *P.B. v. Koch*, 96 F.3d 1298, 1302 -03 (9th Cir. 1996) (substantive due process).

Here, the RCO has an express purpose that is rationally related to the RCO. The RCO imposes limitations on rent increases in mobile home parks

Hodel v. Va. Surface Min. & Reclamation Ass'n,
452 U.S. 264 (1981).....2, 8

K & K Const., Inc. v. Dep't of Envtl. Quality,
705 N.W.2d 365 (Mich. Ct. App. 2005) 20

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987).....10

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005).....6, 7, 8, 13

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982).....12

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992).....11

Mehling v. Town of San Anselmo,
No. A102563, 2004 WL 1179428
(Cal. App. 1st Dist. May 28, 2004).....18

Pa. Coal Co. v. Mahon,
260 U.S. 393 (1922).....7

Palazzolo v. Rhode Island,
533 U.S. 606 (2001).....passim

Pennell v. City of San Jose,
485 U.S. 1 (1988).....13

Raceway Park, Inc. v. Ohio,
356 F.3d 677 (6th Cir. 2004) 19

with the purpose of protecting mobile home owners from "unreasonable rents." Although the Court held, in connection with the previous summary judgment Order, that the RCO did not "substantially advance" its stated purpose, there are two reasons why that holding is of limited relevance today. First, the Supreme Court has invalidated the "substantially advances" test as a measure of unconstitutionality. The Supreme Court noted that the "substantially advances" test has no applicability to takings jurisprudence, and was "regrettably imprecise" when applied to due process jurisprudence in that it suggested a means-ends test – i.e., it implied that in order to pass rational basis review, a challenged law must actually achieve some legitimate public purpose. *Lingle*, 125 S. Ct. at 2083-84. Such is not the law. Rather, the Supreme Court noted that where a challenged law is not rationally related to a legitimate public purpose, it may also not be actually effective in achieving such a purpose. *See id.* Plaintiff argues that the RCO is not actually effective in achieving its purpose, as reflected in the premium on sale that it has created.

However, this implicates the second reason why the Court's holding regarding the RCO's failure to "substantially advance" its stated purpose is of limited relevance. In connection with the present Motion, the City has presented additional evidence, in the form of an expert report, that tends to establish that the RCO is at least partially effective. Many of the residents who live in the mobile homes in the Park

have not sold their mobile homes, did not pay a premium, and continue to enjoy the benefits of low-cost housing as a result of the RCO.

Therefore, the uncontroverted evidence does not establish that the RCO is arbitrary, irrational, or malicious, and summary judgment in favor of Plaintiffs as to these claims is therefore denied.

V. Due Process – Just and Reasonable Return

Plaintiffs contend that they have a substantive due process right to a fair rate of return on their investment in the Park. This doctrine was discussed in a Supreme Court case regarding price-control; specifically, this substantive due process right finds its roots in a Supreme Court case discussing the Natural Gas Act of 1938, which allowed the Federal Power Commission to regulate the price of natural gas. *See Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281 (1944) ("[T]he fixing of 'just and reasonable' rates, involves a balancing of the investor and consumer interests. . . . [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include the service of the debt and dividends on the stock."). Broadly read, this case requires that where a legislative body imposes price controls, it must create some

mechanism to provide for a fair rate of return on investment.

The Ninth Circuit has applied this concept to rent-control ordinances. For instance, Plaintiffs rely on *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 958 (9th Cir. 1991), *vacated on other grounds as stated in* 938 F.2d 951 (9th Cir. 1992),[7] which held that a plaintiff may have a substantive due process claim where a rent-control ordinance failed to provide for a "fair and reasonable" return on an investment because it denied rent increases to allow for a return on additional capital improvements:

> [E]very dollar the landlord puts into the property by way of capital improvements constitutes an investment in the property for which a "fair and reasonable" return must be allowed. Breaking even is not enough; the

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[7] At the hearing on this matter, counsel for the City argued that the Court should disregard *Sierra Lake* because the United States Supreme Court vacated the court's judgment. Although the Supreme Court vacated the judgment and remanded the action, the Ninth Circuit reinstated the relevant portions of *Sierra Lake*. *See City of Rocklin v. Sierra Lakes Reserve*, 506 U.S. 802, 113 S. Ct. 31 (1992) ("The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Yee v. City of Escondido. . . ."); *Sierra Lake Reserve v. City of Rocklin*, 987 F.2d 662 (9th Cir. 1993) ("We therefore vacate Part I of the *Sierra Lake Reserve* opinion, which dealt with the physical taking claim. We retain Part II because the due process and equal protection claims it considered are unaffected by *Yee*.").

> law must provide for a profit on one's investment. . . . Thus, Ordinance 529 must do more than simply allow plaintiff to pass through certain costs; it must ensure that plaintiff will receive a reasonable return on those expenditures. To the extent plaintiff alleges that the rent increases allowed on account of capital improvements merely offset the cost of those improvements (or less), it has stated a claim for a violation of substantive due process. . . .

Id. (citation omitted). In reaching this holding, the Ninth Circuit relied on *Guaranty National Insurance Co. v. Gates*, 916 F.2d 508, 512-14 & n. 4 (9th Cir. 1990), which noted that a law is unconstitutional where it provides only for a break-even point and does not allow for a fair rate of return.

The Court must consider Plaintiffs' challenge in its context: Plaintiffs have made a facial challenge to the RCO. A facial challenge to a law's constitutionality is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The fact that [a challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . ." *Id.*

Here, a provision in the RCO allows for an increase, in an amount up to one-half of the automatic

increase, "as a just and reasonable return on investment." Goleta City Code, § 11A-5(i)(1). This amount may – or may not – be sufficient to constitute a "fair and reasonable" return on investment. As a result, it is possible that the RCO could be administered in a constitutional manner. Accordingly, the RCO is not facially unconstitutional for failure to provide for a fair rate of return on Plaintiffs' investment, and the Court denies Plaintiffs' Motion for Summary Judgment as to this issue.

VI. Conclusion

As set forth above, the Court denies Plaintiff's Motion for Partial Summary Judgment (docket #122).

Dated: April 4, 2006

/s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, Judge
UNITED STATES DISTRICT COURT

Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County,
793 A.2d 545 (Md. 2002).....18

Rith Energy, Inc. v. United States,
270 F.3d 1347 (Fed. Cir. 2001).....17

Rural Water Co., Inc. v. Zoning Bd. of App. of Town of Ridgefield,
947 A.2d 944 (Conn. 2008) 19

Schooner Harbor Ventures, Inc. v. United States,
569 F.3d 1359 (Fed. Cir. 2009).....17

Shaw v. County of Santa Cruz,
88 Cal. Rptr. 3d 186 (Cal. App. 1st Dist. 2008) 20

Sinclair Broad. Group, Inc. v. F.C.C.,
284 F.3d 148 (D.C. Cir. 2002).....19

Stansbury v. Jones,
812 A.2d 312 (Md. 2002).....18

State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm'rs,
875 N.E.2d 59 (Ohio 2007) 18

State ex. rel. Shemo v. Mayfield Heights,
765 N.E.2d 345 (Ohio 2002) 18

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997).....8

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002).....8, 14

Travis v. Cnty. of Santa Cruz,
94 P.3d 538 (Cal. 2004).....19

Weatherford v. City of San Marcos,
157 S.W.3d 473 (Tex. App. 2004).....20

Wensmann Realty, Inc. v. City of Egan,
734 N.W.2d 623 (Minn. 2007).....18

Yee v. City of Escondido,
503 U.S. 519 (1992).....12

Statutes and Rules

California Government Code § 57376 5

California Rule of Court 8.1115.....18

Ninth Circuit Rule 35-3 6

U.S. Supreme Court Rule 10 20-21

STATEMENT OF THE CASE

In 1997, Petitioners purchased a mobilehome park subject to a rent control ordinance adopted by Santa Barbara County in 1979 and amended in 1987. Upon incorporating in 2002, Respondent City of Goleta adopted the ordinance without change. Petitioners argue that this 2002 enactment, on its face, took their property without compensation.

Petitioners contend that, in rejecting their claim, the Ninth Circuit, en banc, flouted this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Their petition is founded on the false premise that the en banc court adopted a categorical rule barring takings claims by property owners who acquired their property after it became subject to regulation.

Eight judges of the Court of Appeals did not blithely ignore this Court's holding in *Palazzolo* and adopt such a categorical rule. Rather, the en banc court found no taking after faithfully applying the three-factor test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), to the unusual facts of this case.

First, the court recognized that Respondent's enactment of the ordinance in 2002, on its face, had no effect on the value of Petitioners' property because the County's rent control ordinance had applied to the property for the preceding two decades in identical form. Any economic impact of the rent control program was caused when the County adopted and amended it long before. The rent limits applicable to Petitioners' property remained precisely the same after Respondent's 2002 enactment as before. The economic impact of the "mere enactment" of Respon-

dent's ordinance on Petitioners was therefore nil. *See Hodel v. Va. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 295 (1981).

Second, Petitioners had no investment-backed expectation of using the property in a manner inconsistent with the longstanding rent control regulation. They purchased the property in 1997, ten years after the County amended the challenged rent limits, and they paid a price that reflected those limits. When they purchased the property, Petitioners could not have expected that they could avoid the regulation. Accordingly, in continuing the existing regulation, Respondent did not impair any legitimate expectation about the return Petitioners could earn on that investment.

Third, the en banc court correctly concluded that *Penn Central*'s "character of the government action" factor supports rejecting the takings claim. The 2002 enactment caused no physical invasion of Petitioners' property and indeed did not change the status quo at all. It only perpetuated a regulation that two decades before had "adjusted the benefits and burdens" of the commercial relationship between mobilehome park owners and tenants. *Penn Central*, 438 U.S. at 124.

Because the en banc decision did no more than apply the firmly-established *Penn Central* factors, it is consistent with both *Palazzolo* and the post-*Palazzolo* decisions of the lower courts, which have held uniformly that the circumstances of the claimant's acquisition of property remain relevant in a *Penn Central* analysis.

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No. 10-1125

IN THE
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. THE NINTH CIRCUIT HELD THAT PETITIONERS' POSTENACTMENT PURCHASE ALONE WAS "FATAL" TO THEIR CLAIM 2

II. THE CITY CONCEDES THAT FEDERAL AND STATE APPELLATE COURTS HAVE REJECTED THE PROPOSITION THAT A POSTENACTMENT PURCHASER MAY NOT BRING A REGULATORY TAKINGS CLAIM 6

III. THE FACTUAL DISPUTES THAT THE CITY RAISES UNDERSCORE THE NINTH CIRCUIT'S ERROR IN RESOLVING THIS CASE AT SUMMARY JUDGMENT 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Buhmann v. State,
201 P.3d 70 (Mont. 2008) 8

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 11

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) 6

Mehling v. Town of San Anselmo,
No. A1-2563, 2004 WL 1179428
(Cal. Ct. App. May 28, 2004) 6

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987) 1

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 1, 4

Penn Cent. Transp. v. New York City,
438 U.S. 104 (1978) 4

Raceway Park, Inc. v. Ohio,
356 F.3d 677 (6th Cir. 2004) 7

Rural Water Co. v. Zoning Bd. of Appeals,
947 A.2d 944 (Conn. 2008) 8

Shaw v. Cnty. of Santa Cruz,
88 Cal. Rptr. 3d 186
(Cal. Ct. App. 2008) 9

Sinclair Broad. Group, Inc. v. FCC,
284 F.3d 148 (D.C. Cir. 2002) 7

Travis v. Cnty. of Santa Cruz,
94 P.3d 538 (Cal. 2004) 7

Rules

Cal. R. Ct. 8.1115 7

REPLY BRIEF FOR PETITIONERS

Respondent City of Goleta concedes that in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected a "'blanket rule'" that "a property owner who acquired property with notice of the challenged regulation could never challenge that regulation as an uncompensated taking." Brief in Opp. 14 (citing and quoting *Palazzolo*, 533 U.S. at 616, 626). The City also appears to concede, contrary to the Ninth Circuit's holding below, that *Palazzolo* applies not only to those who acquire property "by operation of law, during the period when the owner was ripening the claim," Pet. App. 15a, but also to those who purchase property after a regulation is promulgated—a concession compelled by *Palazzolo*'s plain language. *See, e.g.*, *Palazzolo*, 533 U.S. at 628 (rejecting "blanket rule that *purchasers* with notice have no compensation right" (emphasis added)); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987).

Instead of defending the Ninth Circuit's decision on its own terms, the City rewrites it. According to the City, the Ninth Circuit conducted a fact-intensive *Penn Central* analysis that did not turn solely on the fact that petitioners had purchased the mobile-home park after the rent-control regime had gone into effect. But the City's own analysis gives the game away: Echoing the Ninth Circuit, the City argues that each of the three *Penn Central* factors turns solely on the timing of petitioners' purchase. In the City's view, the challenged ordinance has no "economic impact" on petitioners because it "had applied to the property for the preceding two decades"; their investment-backed expectations were not upset because they purchased the property "ten years after

the County amended the challenged rent limits"; and the character of the government action was such that it "did not change the status quo." Brief in Opp. 1–2. Repackaging the forbidden "blanket rule" as a *Penn Central* analysis cannot reconcile the Ninth Circuit's holding with *Palazzolo*.

In reality, the Ninth Circuit squarely held that petitioners "could have no 'distinct investment-backed expectations'" that they could obtain rent in excess of what was permitted by the preexisting rent-control law, and that this sole fact was "fatal to [petitioners'] claim." Pet. App. 18a–19a. It distinguished *Palazzolo* on the ground that in that case the transfer of property had occurred by operation of law, while petitioners had purchased their mobile-home park, and so "the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.* at 18a; *see also* at 36a (Bea, J., dissenting) ("[T]he majority points out the transfer in *Palazzolo* was by operation of law . . . whereas [petitioners] purchased the mobile home park on the open market. So?"). As the numerous *amici curiae* supporting this petition recognize, the Ninth Circuit's holding "directly contravenes Supreme Court precedent." *Id.* at 35a (Bea, J., dissenting). Accordingly, this Court should grant review.

I. THE NINTH CIRCUIT HELD THAT PETITIONERS' POSTENACTMENT PURCHASE ALONE WAS "FATAL" TO THEIR CLAIM.

In its brief in opposition, the City mischaracterizes the opinion below. Although the Ninth Circuit cited the *Penn Central* factors, the opinion concluded that the sole fact that defeated petitioners' claim was that petitioners had purchased the mobile-home park after the rent-control regime had first gone into ef-

fect. As the court stated, the challenged regulatory restriction was "promulgated long before [petitioners] bought their land, and the rent control regime . . . limited the value of the land when [petitioners] bought it." Pet. App. 14a. The court then treated the "economic impact" and "investment-backed expectations" factors as a single "'primary factor'" and held that this primary factor was "fatal to [petitioners'] claim" because "the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.* at 18a. Petitioners, the court argued, "could have no 'distinct investment-backed expectations' that they would obtain illegal amounts of rent." *Id.* at 19a. If an unlawful taking occurred, the court reasoned, it "occurred in 1979 and 1987, from other landlords, and probably benefitting other tenants." *Id.* at 22a. There is no reasonable reading of this analysis other than that a postenactment purchaser may not challenge a law as a regulatory taking.

Even while purporting to recount the Ninth Circuit's fact-intensive *Penn Central* analysis, the City's brief in opposition makes clear that petitioners' takings claim was rejected (at summary judgment) solely because they purchased the property subject to the rent-control regime. The City argues, for example, that the ordinance does not have a severe economic impact on petitioners because it was only the initial enactment of the rent-control regime in 1979 and 1987 that depleted the land's value. Brief in Opp. 9. Similarly, the City maintains that the ordinance did not impact petitioners financially because they presumably "paid a lower price for their property as a result" of their notice of the preexisting law. *Id.* Indeed, the City's central defense of the rent-control regime is that it was not the 2002 city ordi-

nance that deprived the property of value, but rather the prior (identical) county regulations that were in effect when petitioners acquired the mobile-home park. *Id.* That is just another way of saying that the preexistence of a restriction defeats a regulatory takings claim.

In the same vein, the City argues that the "investment-backed expectations" and "character of the government action" factors do not support petitioners' claim solely because the regulatory restriction predated their purchase of the mobile-home park. *See* Brief in Opp. 11 ("In 1997, when Petitioners purchased the property, the program had been in effect for nearly 20 years."); *id.* at 2 ("The 2002 enactment . . . did not change the status quo at all [but rather] perpetuated a regulation that two decades before had 'adjusted the benefits and burdens' of the commercial relationship between mobile home park owners and tenants." (quoting *Penn Cent. Transp. v. New York City*, 438 U.S. 104, 124 (1978))). That analysis, in which each of the *Penn Central* factors turns exclusively on the timing of the purchase, does not reflect the "'ad hoc, factual inquir[y]'" that the City claims the Ninth Circuit conducted. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (quoting *Penn Cent.*, 438 U.S. at 124).

In addition, the City conspicuously fails to defend the Ninth Circuit's ground for distinguishing *Palazzolo*. According to the Ninth Circuit, petitioners "do not have the problem that *Palazzolo* solved," because *Palazzolo* was limited to avoiding the unfairness that would result from barring a takings claim when property is transferred to a new owner "by operation of law, during the period when the [previous] owner was ripening the claim by exhausting state remedies." Pet. App. 14a–15a. Unlike petitioners, the

Ninth Circuit stated, the property owner in *Palazzolo* did not purchase "the property for a low price reflecting the economic effect of the regulation." *Id.* at 15a. As the petition demonstrated, that reasoning flatly contradicts *Palazzolo*'s repeated statements that its rule encompassed postenactment purchasers, not only those who acquire property by operation of law. *See* Pet. 15.

The City seeks to salvage the Ninth Circuit's holding on the ground that "the court acknowledged that Petitioners could still bring an as-applied challenge," suggesting that petitioners will be able to obtain the relief sought in a subsequent case. Brief in Opp. 15. That suggestion is incorrect. The as-applied challenge that the Ninth Circuit envisioned would *not* be a challenge to the imposition of the regulatory scheme; the court ruled that such a claim is barred for postenactment purchasers. Rather, it would be a much narrower challenge to the ordinance's "limitation on the amount by which rents can increase and the provisions for arbitration of rent increases." Pet. App. 16a n.37. In other words, petitioners may be permitted to challenge a *future* regulatory action, such as a too-small increase in the rent ceiling. But with respect to any *past* regulatory actions—*i.e.*, the imposition of the rent-control regime itself, which diminished petitioners' property value by 80% through a one-time wealth transfer to owners of mobile homes—the Ninth Circuit held that petitioners' claim is barred.[1]

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[1] In any event, as the dissent noted, the distinction between a facial and an as-applied challenge—that is, a challenge that the scheme constitutes a taking in every case versus a challenge that it constitutes a taking only in a specific case—has no basis in this Court's takings jurisprudence. "If the *expectations* are

II. The City Concedes That Federal And State Appellate Courts Have Rejected The Proposition That A Postenactment Purchaser May Not Bring A Regulatory Takings Claim.

The City concedes that the Federal Circuit and state appellate courts "recognize that a plaintiff's preacquisition notice of a regulation does not absolutely bar a takings claim," including where the plaintiff acquired the property through purchase. Brief in Opp. 17–18. For that reason, if this Court agrees with petitioners that the decision below bars such claims, the City would have to concede that there is a stark division of authority among lower courts that this Court should resolve.

The City separately argues that there is no division of authority between the Ninth Circuit and California state courts because in *Mehling v. Town of San Anselmo*, No. A1-2563, 2004 WL 1179428 (Cal. Ct. App. May 28, 2004), the court considered a "categorical" regulatory takings claim—that is, a claim that the "regulation denies all economically beneficial or productive use of land," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)—rather than a *Penn Central* claim. But the City leaves unexplained why there would be a distinction between the two types of regulatory takings claims with respect to whether a postenactment purchaser may obtain compensation. And in any event, the California

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[Footnote continued from previous page]

valid and are expropriated, what does it matter as to their existence that they will be injured in all cases (facial challenge) or just in some (as-applied challenge)? Either they are valid expectations, or they aren't." Pet. App. 37a (Bea, J., dissenting).

court expressly held that *Palazzolo* "did not turn on th[e] fact" that "title was transferred by operation of law" and therefore that the "holding and rationale of *Palazzolo* apply regardless of whether title to the property is transferred by operation of law or purchased in an arm's length transaction." *Id.* at *6 n.6. That holding directly conflicts with the Ninth Circuit's understanding of "the problem that *Palazzolo* solved" and its holding that the *Palazzolo* rule does not apply to postenactment purchasers. *See also Travis v. Cnty. of Santa Cruz*, 94 P.3d 538, 545 (Cal. 2004) (explaining that *Palazzolo* discredited the "idea that a postenactment purchaser takes with notice of the legislation and therefore cannot claim it effects a taking").[2]

The City also cites other decisions from federal and state courts that it claims support the decision below. Brief in Opp. 19–20. None of those cases, however, held that *Palazzolo* does not apply to postenactment purchasers, as the Ninth Circuit did. For example, the Sixth and D.C. Circuit cases that the City cites—neither of which discussed *Palazzolo*—merely held, echoing Justice O'Connor's concurrence, that notice of the regulatory restriction is one factor to be considered in the *Penn Central* analysis. *See Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 685 (6th Cir. 2004); *Sinclair Broad. Group, Inc.*

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[2] The City, before trying to turn *Mehling* to its advantage, claims that petitioners "improperly rely on an unpublished decision of the California Court of Appeal," citing a California rule of procedure prohibiting "a court or a party" from citing unpublished decisions. Brief in Opp. 18 n.4 (citing Cal. R. Ct. 8.1115). But California procedural rules do not restrict parties' arguments in this Court, just as they do not govern this Court's opinions.

v. FCC, 284 F.3d 148, 167 (D.C. Cir. 2002). The City's state-court cases all held similarly.

Moreover, nearly all of the state cases arose in a materially different posture than this case: The trier of fact made detailed findings about the plaintiff's investment-backed expectations, and the appellate court reviewed those findings under a deferential standard of review. Here, by contrast, the Ninth Circuit affirmed the district court's grant of summary judgment to the City.

For example, in *Rural Water Co. v. Zoning Board of Appeals*, 947 A.2d 944 (Conn. 2008), the Supreme Court of Connecticut correctly held, citing *Palazzolo*, that "the plaintiff's takings claim [was] not barred merely because it acquired title to the property *after* the upzoning that ultimately defeated its later variance applications." *Id.* at 956 n.15. Applying the "clearly erroneous" standard to the factual findings of the trial court, the court denied the plaintiff relief because it had not presented sufficient evidence of its investment-backed expectations or a diminution in the value of its property. *Id.* at 955–57.

Likewise, in *Buhmann v. State*, 201 P.3d 70 (Mont. 2008), the Supreme Court of Montana reviewed under the "clearly erroneous" standard the district court's comprehensive factual findings, entered after a bench trial, about the reasonableness of the plaintiffs' expectations. *Id.* at 79, 93–94. The court then carefully weighed all three *Penn Central* factors, one of which it held to support a finding of a regulatory taking, and concluded that "the District Court did not err" in entering judgment in favor of the defendant. *Id.* at 94. In the decision below, by contrast, the Ninth Circuit did not permit the development of a factual record that would have facili-

tated such thorough review. *See also Shaw v. Cnty. of Santa Cruz*, 88 Cal. Rptr. 3d 186, 224 (Cal. Ct. App. 2008) (reviewing for substantial evidence district court's findings after bench trial and concluding that the "record thus supports that neither the County's action nor the subsequent passage of time directly affected any *distinct*, investment-backed expectations held by the Shaws that specifically related to their electrical-permit application").

In any event, to the extent there are other appellate cases adopting the Ninth Circuit's reasoning, that would only amplify the need for this Court to resolve the question presented.

III. The Factual Disputes That The City Raises Underscore The Ninth Circuit's Error In Resolving This Case At Summary Judgment.

Throughout its brief, the City argues the contested factual issues of this case, all of which were obviated by the legal rule applied by the Ninth Circuit to affirm the lower court's award of summary judgment to the City. Brief in Opp. 8–14. These factual issues thus are irrelevant to the question presented and have no bearing on whether that question warrants this Court's review.

In any event, because this case does arise from an award of summary judgment, at this stage genuinely disputed issues must be resolved in petitioners' favor—not the City's. And the summary-judgment record demonstrates that most, if not all, of those questions would ultimately be so resolved. For example, the City protests the dissent's statement that petitioners had "presented evidence that the Ordinance deprives them of approximately 80% of the market value of their mobile home park land," Pet. App. 30a

(Bea, J., dissenting), on the ground that "the evidence showed only that the mobilehome space *rents* controlled by the ordinance were below prevailing market *rents* for comparable spaces." Brief in Opp. 10. But because the land is used only to rent mobilehome spaces, the 80% reduction in rents equates to an 80% reduction in the value of the land. And a "finder of fact could easily determine that a loss of 80% of the market value of property is . . . a severe economic burden." Pet. App. 32a (Bea, J., dissenting).

The City similarly argues that the petition failed to discuss the evidence that the City's voluntary adoption of the preexisting rent-control regime in 2002 upset petitioners' investment-backed expectations. Brief in Opp. 11 n.3. Petitioners presented this evidence to the district court, but the Ninth Circuit ignored it in holding that the City was properly awarded summary judgment on the sole, "fatal" ground that petitioners had purchased the land after the rent-control regime was already in effect. *See* Pet. App. at 41a (Bea, J., dissenting) (discussing "evidence presented to the district court" of petitioners' investment-backed expectations). And even if petitioners had presented no evidence of investment-backed expectations, that is but one consideration in the *Penn Central* analysis and could not alone justify granting summary judgment to the City, particularly in light of the severe diminution in the value of petitioners' land as a result of the rent-control ordinance.[3]

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[3] The City also argues that the investment-backed expectations of the mobile-home owners would be disrupted by repealing the ordinance. *See* Brief in Opp. 21–22. But this Court has never held that the expectations created by the challenged

Finally, the City contends that both the petition and the dissent presented arguments with regard to the "character of the government action" that conflict with *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), which held that a law may not be deemed a taking on the ground that it fails to advance a legitimate state interest. Brief in Opp. 13. But it is not the mere fact that the ordinance does not advance its purpose of reducing rents that renders it a taking. Rather, because it "does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home," Pet. App. 44a (Bea, J., dissenting)—that is, because it accomplished only a one-time wealth transfer—it is not a "public program adjusting the benefits and burdens of economic life to promote *the common good*," which is precisely the standard articulated in *Lingle*. 544 U.S. at 539 (internal quotation marks omitted; emphasis added); *see also id.* at 542 ("how [a] regulatory burden is *distributed* among property owners" is relevant to takings analysis).

[Footnote continued from previous page]

regulation itself are relevant to the *Penn Central* analysis. Such a rule would permit governments to transfer private property from one party to another with impunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CALIFORNIA APARTMENT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS FILED WITH CONSENT OF ALL PARTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. This Court Must Address the Viability of the City's Rent Control Ordinance as to Substantive Due Process Claims in Light of Its Decision in Lingle v. Chevron U.S.A., Inc. 5

A. In Lingle, this Court Altered the Standard for Determining Whether Rent Control Violates Substantive Due Process Rights 5

B. The City's Rent Control Ordinance Deprives Land Owners of Property Rights Without Due Process of Law Because it is Ineffective in Substantially Advancing a Legitimate State Purpose, as Previously Determined by the Trial Court 9

C. The Ninth Circuit Court of Appeals and Other California Courts Have Recognized the Impact of Lingle on

Substantive Due Process Claims in the Context of Property Rights 10

II. This Court's Decision as to the Constitutionality of Rent Control Could Impact Rental Properties and the Affordable Housing Market Throughout California 14

CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 472 (9th Cir. 1994) 5, 6

Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007) 11

Guggenheim v. City of Goleta, 2010 U.S. App. LEXIS 25981, at * 31 (9th Cir. 2010) 9

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) 2, 3, 5-7, 9-13, 18

MHC Financing Ltd. Partnership v. City of San Rafael, 2006 U.S. Dist. LEXIS 89195, *26-27 (N.D. Cal. 2006) 11-13

Pennell v. City of San Jose, 485 U.S. 1 (1988) 7-9

S. G. Borello & Sons, Inc. v. City of Hayward, 2006 U.S. Dist. LEXIS 86293, *11 (N.D. Calif. 2006) 11,12

WMX Techs. v. Miller, 104 F.3d 1133 (9th Cir. 1997) 5

OTHER AUTHORITY

Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd., 509 F.3d 1020, 1026 (9th Cir. 2007) 16

C.P. Rydell, et al., The Impact of Rent Control on the Los Angeles Housing Market. Report N-1747-LA (Santa Monica: The Rand Corporation, 1981)

Pet. App. 156a-57a 10

Pet. App. 157a, 159a 10

BRIEF OF *AMICUS CURIAE* [1] CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PETITIONER[2]

INTEREST OF *AMICUS CURIAE*

The California Apartment Association ("CAA") is the largest state-wide rental housing trade association in the country, representing more than 50,000 owners and operators who are responsible for nearly two million rental housing units throughout California. CAA has the goal of promoting fairness and equality in the rental of residential housing and aiding in the availability of high quality rental housing in California. CAA has advocated on behalf of rental housing providers in legislative, judicial and other forums in California and nationally.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus curiae* discloses that counsel of record for all parties received notice *of amicus curiae's* intention to file this brief more than ten days prior to the due date, and counsel for all parties have consented to the filing of this *amicus* brief.

CAA submits this *amicus brief* to assist the Court in understanding the far-reaching public policy effects of government control of rents and the invalidity of rent control measures, such as the City of Goleta's Mobile Home Rent Control Ordinance (the "City's RCO"), as violative of substantive due process under this Court's decision in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

Specifically, CAA is opposed to government control of rents and believes strongly that rent control is an ineffective and detrimental housing policy that is as damaging to renters as it is to rental property owners. In states like California, with its rapidly growing population, CAA contends rent control is particularly destructive because it discourages the construction of new housing, and investment in existing housing, at precisely the time it is needed most. While CAA is equally opposed to excessive rent increases, it firmly believes that the most effective way to ensure the existence of safe, affordable homes with stable rents is for government to recognize and harness market forces by establishing policies that encourage the construction of new housing and support investment in existing housing. Such measures, premised on sound economic and social policies, allow property owners to produce sufficient income to accommodate the

basic needs of residents and, encourage the production of new housing. Artificial restraints on rent imposed by rent control have the real and unfortunate effect of reducing both the quality and quantity of available affordable housing.

In light of this Court's decision in Lingle, it is of paramount importance to CAA and its members that this Court grant review and find rent control ordinances, such as the City's RCO, violate substantive due process because they are ineffective in substantially advancing legitimate state interests. This is especially true for mobile home rent control where, as here, it is undisputed that there is no mechanism for preventing mobile home owners from capturing the present value of the reduced rents as a premium on the sale of their mobile homes. Accordingly, CAA respectfully requests a grant of review by this Court.

SUMMARY OF ARGUMENT

Rent control measures were originally enacted to protect low income individuals and families by eliminating perceived windfall profits by landlords. The present day rent control debate, however, is much more complex than the tenant verses landlord competition. Decades of economic

and social havoc caused by rent control across the country demonstrate that such policies are not effective at promoting housing to low income populations and have actually worsened the affordable housing crisis. Rent control has shown to irrefutably decrease the quality and quantity of available affordable housing, increase high-priced shadow markets and provide a disproportionate benefit to high-income renters who hoard the price controlled units, among other negative results. As discussed herein, rent control policies in the current social, economic, and political environment are not effective in substantially advancing a government interest and, thus, are in violation of substantive due process under Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

In its decision, the Ninth Circuit Court of Appeals glossed over the constitutional viability of the City's RCO without addressing whether such rent control policies can survive a substantive due process challenge. As set forth herein, CAA respectfully urges this Court to grant the Petition for Writ of Certiorari in order to determine that rent control ordinances, such as the City's RCO, cannot pass muster as they violate the requirements of substantive due process under prevailing law.

ARGUMENT

I. This Court Must Address the Viability of the City's Rent Control Ordinance as to Substantive Due Process Claims in Light of Its Decision in Lingle v. Chevron U.S.A., Inc.

A. In Lingle, this Court Altered the Standard for Determining Whether Rent Control Violates Substantive Due Process Rights.

Prior to this Court's decision in Lingle, rent control ordinances survived substantive due process challenges if they were "*designed* to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances." Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 472 (9th Cir. 1994) ((internal citations omitted), *overruled by* WMX Techs. v. Miller, 104 F.3d 1133 (9th Cir. 1997) on other grounds, (emphasis in original)). The Ninth Circuit Court of Appeals in Carson Harbor continued to state "***[t]his deferential inquiry does not focus on the ultimate effectiveness of the law***, but on whether the enacting body could have rationally believed at

the time of enactment that the law would promote its objective." Carson Harbor, 37 F.3d at 472 (emphasis added).

Under Lingle, the applicable standard changed. The constitutionality of rent control ordinances shall be assessed on the ***effectiveness*** of the policy in substantially advancing a legitimate government purpose. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005) (emphasis added). Lingle concerned a Hawaii statute which limited the rent that oil companies may charge dealers leasing company-owned service stations. Lingle, 544 U.S. at 533. At issue before this Court was "whether the 'substantially advances' formula announced in *Agins* is an appropriate test for determining whether a regulation effects a *Fifth Amendment* taking." Lingle, 544 U.S. at 532 (emphasis in original). This Court concluded it was not. Id. at 545.

In concluding the regulation was not a taking, the Court opened the door for a substantive due process challenge. This Court performed an extensive analysis as to the development of the "substantially advances" formula, specifically finding that the formula "***prescribes an inquiry in the nature of a due process***, not a takings, test,

and that it has no proper place in our takings jurisprudence." Lingle, 544 U.S. at 540 (emphasis added). This Court reasoned:

> The "substantially advances" formula suggests a means-end test: It asks, in essence, **whether a regulation of private property is *effective*** in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that **fails to serve** any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the *Due Process Clause*.

Lingle, 544 U.S. at 542 (italicized emphasis in original, bold emphasis added).

By requiring an analysis of the effectiveness of a regulation, Lingle questions prior case law that focused solely on the rational relationship between a regulation and its intended purpose. In Pennell v. City of San Jose, 485 U.S. 1 (1988), this Court stated:

> The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established: "Price control is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . . ."

Pennell, 485 U.S. at 11 (internal citations omitted). Under Pennell, the determination of whether a regulation was "arbitrary, discriminatory, or demonstrably irrelevant" rested entirely on whether the regulation had a "legitimate and rational goal." Id. at 13. It was on this questionable basis that the Ninth Circuit in the cause currently before the Court refused to address whether the City's RCO survived a substantive due process inquiry, reasoning:

> Whether the City of Goleta's economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or will undermine those purposes, is not for us to decide. We are a court of law... and are bound by precedent

> establishing that such laws do have a rational basis.

Guggenheim v. City of Goleta, 2010 U.S. App. LEXIS 25981, at * 31 (9th Cir. 2010) (citing Pennell v. City of San Jose, 485 U.S. at 13).

B. The City's Rent Control Ordinance Deprives Land Owners of Property Rights Without Due Process of Law Because it is Ineffective in Substantially Advancing a Legitimate State Purpose, as Previously Determined by the Trial Court.

The Ninth Circuit's recent decision fails to apply the "effectiveness" standard for determining if a policy substantially advances a stated public purpose to survive a substantive due process claim, as provided for in Lingle. Unfortunately, the result of the current decision provides no guidance or precedent as to the constitutional viability of ineffective rent control policies that continue to burden California's property owners and renters alike.

Accordingly, and pursuant to the substantive due process test articulated in Lingle, this Court must find that the City's RCO is unconstitutional because it is ineffective in substantially advancing its stated pubic purpose of creating affordable housing, as was determined by the district court in this case. As Petitioners assert in their Petition for Writ of Certiorari ("Petition"), the "district court granted petitioners summary judgment on the takings claim, holding that the ordinance 'fails to substantially advance its stated purpose' of creating affordable housing..." Pet. App. 157a, 159a. The district court reasoned "that because the ordinance 'contain[ed] no mechanism for preventing mobile home owners from capturing the present value of the reduced rents as a premium on the sale of the mobile homes,' it did not meet the goal of ensuring low-cost housing." Pet. App. 156a-57a. Accordingly, this Court should find that the City's RCO violates substantive due process.

C. The Ninth Circuit Court of Appeals and Other California Courts Have Recognized the Impact of Lingle on Substantive Due Process Claims in the Context of Property Rights.

In recent years, an increasing number of

courts have cited to Lingle for the proposition that a substantive due process claim is no longer barred in the context of an allegation of a deprivation of rights in real property. See Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd., 509 F.3d 1020, 1026 (9th Cir. 2007) (stating substantive due process can be an appropriate vehicle to challenge the rationality of land use regulations); MHC Financing Ltd. Partnership v. City of San Rafael, 2006 U.S. Dist. LEXIS 89195, *26-27 (N.D. Cal. 2006) (finding "Lingle undercuts the Ninth Circuit's basis for barring substantive due process challenges to deprivations of property."); Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007) (stating "Lingle pulls the rug out from under our rationale for totally precluding substantive due process claims. . . ."); S. G. Borello & Sons, Inc. v. City of Hayward, 2006 U.S. Dist. LEXIS 86293, *11 (N.D. Calif. 2006) (recognizing "Lingle marked a path for substantive due process challenges").

As courts look to Lingle for authority that substantive due process is a proper claim for deprivation of property rights, they must also follow the standard set forth by this Court in Lingle that only an effective regulation is one that substantially advances a legitimate state purpose and meets the requirements of a substantive due process. This

theory has been embraced by several courts. In S. G. Borello & Sons, Inc. v. City of Hayward, the U.S. District Court for the Northern District of California recognized:

> [A]fter Lingle, there is no explicit text for assessing whether a regulation is ***effective*** in achieving a legitimate public purpose; only the due process clause remains.

S. G. Borello & Sons, Inc., 2006 U.S. Dist. LEXIS 86293, *10 (emphasis added). Soon after, the same court determined that, in applying Lingle, not only was a substantive due process challenge to deprivations of property appropriate, but "substantially advances" is the proper test for the analysis, finding ". . . 'the failure of the regulation to substantially advance any legitimate public purpose in violation of due process . . . would give rise to a cause of action for damages under 42 U.S.C. § 1983'." MHC Financing Ltd. Partnership v. City of San Rafael, 2006 U.S. Dist. LEXIS 89195, *26-27 (2006).

At issue in MHC Financing Ltd. Partnership was the Mobilehome Rent Control Ordinance of the City of San Rafael. MHC Financing, 2006 U.S. Dist.

Lexis 81895, * 1 2 (2006). The City of San Rafael moved for summary judgment on MHC's claims, including MHC's substantive due process challenge to the city's mobilehome rent control ordinance. Id. at *24-25. The City contended that MHC's substantive due process challenge fails because the "ordinance is rational as a matter of law... rent control is pervasive and legislative determinations about the ***efficacy*** of economic legislation cannot be second-guessed by the court" Id. at *27 (emphasis added). Relying on Lingle, the court denied the City of San Rafael's motion for summary judgment on the substantive due process claim, reasoning:

> That Lingle has shifted the judicial assessment of ***effectiveness*** from takings law to the realm of substantive due process does not erase the significance of repeated judicial skepticism of these premium-transfer rent control ordinances. To the contrary, the reasoning developed under the now defunct "substantially advances" formula plainly bears on MHC's due process challenge, as ***both doctrines, in essence, assess the relationship between the City's means and ends***.

Id. at *29 (emphasis added). The court continued:

> Affordable housing may be a reasonable end. But the City fails on the present record to persuade that the ordinance's one-time premium transfer ***as a means of achieving*** that end cannot be analyzed for rationality.

Id. at *29-30 (emphasis added) (also recognizing that "following others does not ensure a sensible path" since "to do so would insulate even the most arbitrary law from judicial review for the mere reason that two or more cities were obtuse enough to enact it"). This case presents this Court with the opportunity to adopt this sage analysis.

II. This Court's Decision as to the Constitutionality of Rent Control Could Impact Rental Properties and the Affordable Housing Market Throughout California.

As stated above, rent control has proven ineffective and counterproductive at creating and sustaining affordable housing for the country's neediest. The damaging economic and social effects of rent control are long-lasting and not confined to

only those communities that adopt them. In fact, rent control actually injures the very segment of the population that affordable housing laws are intended to protect.

Rent control is an artificial means of keeping housing prices low. As many economists will affirm, the short-term reduction in price is little reprieve over the long run as prices increase and supplies decrease. By artificially forcing rents below market level, landlords do not get a fair return on their investment. Not surprisingly, this causes property owners to finance more profitable investments and direct capital out of the rental market. As a result, needed improvements are not made to existing housing, rental housing is converted to other uses or simply abandoned, and new construction in the rental market dramatically declines. Studies show that from 1980 to 2000 (even after lowering rent control restrictions during the 1990's), total rental housing stock in Berkeley and Santa Monica fell by nearly seven and nine percents, respectively. The counties, on the other hand, showed extensive overall growth as Alameda increased over 18 percent and Los Angeles increased almost 16% over the

same twenty-year period.[3]

Rent controls discourage landlords from performing necessary repairs and maintenance to existing housing. This results in a deterioration of the quality of available affordable housing, possibly to the point where the controlled rent is actually the market rent. A study by the Rand Corporation of Los Angeles' rent control law found that 63 percent of the benefit to consumers of lowered rents was offset by a loss in available housing due to deterioration and other forms of disinvestment.[4]

Additionally, as the price of a few, controlled units are forcibly held down in the regulated markets, the costs for other rental housing in the surrounding unregulated areas is driven up above market levels. This results in the creation of shadow markets which offer higher-priced rental units to satisfy the demand for housing left unfulfilled by the regulated markets. In essence, because there are only a few available rent-

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[3] Rent Control Issues and Impacts, Sacramento Regional Research Institute, 2003, pg. 5.

[4] C.P. Rydell, et al., The Impact of Rent Control on the Los Angeles Housing Market. Report N-1747-LA (Santa Monica: The Rand Corporation, 1981).

controlled units, which are generally hoarded by middle- and upper-income tenants, everyone else is forced to find expensive housing in the shadow markets. Thus, the reality of rent control is that affordable housing is less accessible to low-income individuals and families, who are forced to live in uncontrolled apartments and pay above-market rents.

As suggested above, the costs of rent control disproportionately affect the low-income population. These costs include a significant reduction in the quality of existing rental housing or a substantial reduction in access to new affordable housing. In addition, rent control promotes immobility. It induces tenants to stay in the same unit for an excessive period of time, even if their situations and preferences change. In fact, tenants in rent-controlled units are often too reluctant to accept higher paying jobs in another city simply because they do no want to give up their controlled unit. Policies that promote such immobility among the labor force offer no benefit to California's communities and overall economic health.

The situations described above are only the tip of the iceberg when it comes to the damaging effects of rent control. It is largely undisputed that

over the last several decades rent control whether applied to multi-family housing or mobile home parks, is not effective at providing affordable housing to those that need it the most. CAA anticipates that in the aftermath of Lingle, courts across the nation will be forced to address due process challenges to rent control ordinances. Accordingly, CAA urges this Court to grant review on this issue and find that rent control regulations are not effective in substantially advancing any legitimate government interest, and therefore, no longer meet the requirements of substantive due process.

CONCLUSION

Rent control is an ineffective means of promoting affordable housing. Under Lingle v. Chevron U.S.A., Inc., government regulations that are ineffective at substantially advancing a legitimate government purpose violate substantive due process. This case provides the Court with an opportunity to instruct the Ninth Circuit to apply the effectiveness test articulated in Lingle in assessing the constitutionality of rent control. Due to the profoundly detrimental economic and social ramifications of rent control, this Court must find that rent control is ineffective at achieving its stated

purposes and, therefore, violative of substantive due process.

April 13, 2011

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No. 10-1125

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In The

Supreme Court of the United States

DANIEL GUGGENHEIM, et al.,

Petitioners,

v.

CITY OF GOLETA, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF, *AMICUS CURIAE*, OF CALIFORNIA ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
I.	BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITIONERS	1
II.	IDENTITY AND INTEREST OF *AMICUS CURIAE*	1
III.	CASE SUMMARY	3
IV.	GOLETA'S ORDINANCE GIVES THE LAND VALUE OF THE GUGGENHEIM'S PROPERTY TO THE COACH OWNERS WHEN THEY SELL THEIR UNIT	4
V.	GOLETA'S ORDINANCE INTERFERES WITH INVESTMENT BACKED EXPECTATIONS OF MOBILE HOME PARK OWNERS	7
VI.	GOLETA'S ORDINANCE VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT IS AN ILLEGITIMATE USE OF THE GOVERNMENT'S POLICE POWER: IT DOES NOT CONTROL HOUSING COSTS	10
VII.	CONFISCATORY RENT CONTROL SHOULD BE TREATED AS A FACIAL TAKING AS A MATTER OF PUBLIC POLICY	15
VIII.	CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Carson Harbor Vill. Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994) 11

Cashman v. City of Cotati, 124 F.3d 1150 (9th Cir. 1997) 8

Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009) 6

Guggenheim v. City of Goleta, No. 06-56306, 2010 WL 5174984 (9th Cir. Dec. 22, 2010) 2, 8, 10, 14

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 7, 11, 15

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 3, 6, 9

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 2, 7, 15

WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) 11

CONSTITUTIONAL PROVISION

U.S. Const. amend. V 15, 16

U.S. Const. amend. XIV 16

OTHER AUTHORITIES

Kenneth Barr, *The Right to Sell the "Im" mobile Manufactured Home in Its Rent Controlled Space in the "Im" mobile Home Park: Valid Regulation of Unconstitutional Taking?*, 24 URB. LAW. 157 (1992) 7

TABLE OF AUTHORITIES – Continued

Page

Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399 (1988) 7, 13

U.S. Department Of Housing And Urban Development, Report To Congress On Rent Control, p. 10 (1991) 12

I. BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the California Association of REALTORS® (hereinafter C.A.R.)[1] submits this brief in support of the petitioners Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce (collectively, the "Guggenheims").

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

C.A.R. is a voluntary trade association, and its members consist of local boards and associations of REALTORS® and more than one hundred seventy thousand (170,000) persons licensed as real estate brokers and salespersons by the State of California. REALTORS® assist members of the public in buying and selling real property.

As a representative of the real estate brokerage community which is involved in the sale of all properties, including mobile homes in mobile home parks,

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[1] The parties have consented to the filing of this brief. The letters of consent are on file with the Clerk of the U.S. Supreme Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. The parties were notified of *amicus curiae's* intention to file and waived their right to a 10-day notice.

C.A.R. believes it can provide a unique and important perspective to this case.

For over one hundred years, C.A.R. has advocated protecting private property owners and preserving the alienability of real property. While C.A.R. also advocates for affordable housing, and has established a Housing Affordability Fund, this does not include confiscatory takings to accomplish that goal. In this case, the affordability goal is laudable but not achieved as the ordinance amounts to a transfer of wealth from the mobile home park landowner to the coach owner, particularly upon sale of the coach.

We have read the opinion issued on December 22, 2010 by the Ninth Circuit United States Court of Appeals[2] ruling *en banc* and believe that the court erred in its determination that the City of Goleta's ordinance does not amount to a facial regulatory taking. The dissent is correct when it stated that all three of the *Penn Central, infra,* factors weigh in favor of a finding that Goleta's ordinance is a regulatory taking, that Goleta's ordinance violates substantive due process, and that Goleta's ordinance is therefore unconstitutional.

As the last five years have shown, property values can fluctuate and government action that destabilizes these long held property rights further is in need of clarification. Many properties have

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[2] *Guggenheim v. City of Goleta*, No. 06-56306, 2010 WL 5174984 (9th Cir. Dec. 22, 2010) (*en banc*), Pet. App. 1a.

transferred, both voluntarily and involuntarily in that time. The potential for larger forfeiture of rights upon transfer is an issue clearly in need of addressing for those in the Ninth Circuit. If the decision below holds, the principles in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), will be one more swath of shifting sands in California real estate. For all these reasons, we urge the Court to grant *certiorari*.

III. CASE SUMMARY

The procedural and case summary is presented in the petition for *certiorari* and we will not repeat it here except to highlight one aspect of the so-called "rent control." Goleta is a newly incorporated city on the outskirts of the highly desirable City of Santa Barbara located on the California coast. Locations near the coast have affordability issues and mobile homes are usually less costly than fixed structural housing. Presumably Goleta sought to protect lower housing costs by enacting a mobile home rent control ordinance.

While the City of Goleta's mobile home rent control ordinance capped the rate of annual rent the Guggenheims could charge for their mobile home lots, and capped land rent increases when a mobile home was sold to a new coach owner, the ordinance provided no cap on the amount mobile home owners could charge when leasing or selling the actual mobile home.

Since it is the land, not the coach, that escalates the price of housing in that situation, owners of coaches capture the land value when they sell their coaches at a premium. With coach sales prices unregulated, Goleta's ordinance effects a wealth transfer from the mobile home land owners to "windfall tenants" who sell their coaches. The ordinance is not written in such a way as to effect a legitimate state interest – such as providing affordable housing.

IV. GOLETA'S ORDINANCE GIVES THE LAND VALUE OF THE GUGGENHEIM'S PROPERTY TO THE COACH OWNERS WHEN THEY SELL THEIR UNIT

One can purchase mobile homes in a variety of fashions, each having a separate bundle of rights. Mobile homes can be located in mobile home parks in which the mobile home owner also owns the underlying land and the park provides common area property and services. Mobile homes can also be located in a park in which the park owner owns the land and the unit owner (the "unit" is sometimes called a "coach") leases the right to have the coach on the land. Other parks are designed for more transient uses and the mobile homes are usually referred to as recreational vehicles, though some may stay for many months in such a park. The Guggenheims own the second type of mobile home park: one in which the park owner owns the land and the coach owners own the unit. The coach owners may enter into long leases to protect their rents, or may have shorter term

leases. These are negotiated between the landowner and the tenant-coach owner. These land rents are what Goleta has sought to control.

Mobile home parks have different characteristics compared to typical residential rental properties. Unlike a typical lease where an exiting tenant has nothing to transfer to a new tenant, mobile home units are typically sold by the existing tenants to the new tenants. A private property transaction occurs between the current coach owner/park tenant and the subsequent coach owner/tenant. When the mobile home unit is sold, the lease in the mobile home park must be either assigned or renegotiated with the new coach holder and this is done simultaneously with the sale of the unit. But the Goleta ordinance interferes with this part of the land transaction by capping the amount the mobile home park owner can charge for use of the land. In desirable areas, this simply increases the sales price of the coach. This does not stabilize the cost of housing for those living in such mobile home parks, it enriches those selling their units.

Mobile home rent control creates distortions in the market for transactions between park owners and mobile home owners/park tenants, as well as for transactions between current and prospective mobile home owners/park tenants. In Goleta, it is estimated that the average value of a mobile home, but for the rent control, would be approximately $14,037. However, because of rent control, the average mobile home located on the Guggenheim's property sold for

$119,091. *Guggenheim v. City of Goleta*, 582 F.3d 996, 1019, n.14 (9th Cir. 2009), *en banc reh'g granted* (9th Cir. 2010). Thus, the mobile home unit owner enjoys a windfall by capturing the market value of the land when selling the mobile home unit.

Over time, Goleta's mobile home rent control, which starts out as a minor reduction in rent, leads to dramatic results. Given the structure of Goleta's rent control ordinance, the transfer of value from park owners to tenants will continue unabated in perpetuity.[3] As a result, the longer the period of time, the greater the transfer of wealth from the park owner to the park tenant such that eventually, proportionally almost all value will be transferred to the tenant. At some point, the wealth transfer will exceed 95% of the value of the property – it is only a matter of time. This slow erosion of the transfer of property rights is in contrast to an abrupt one: one is simply more difficult to decipher at the outset. Yet there should be no difference in the law's treatment of the two situations, particularly in light of the absence of a public purpose of lowering housing costs.

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[3] The fact that this wealth transfer continues reinforces why the Ninth Circuit's interpretation of *Palazzolo* is in error, as more fully briefed by the petitioner.

V. GOLETA'S ORDINANCE INTERFERES WITH INVESTMENT BACKED EXPECTATIONS OF MOBILE HOME PARK OWNERS

In the seminal case of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court identified certain factors that need to be considered to determine whether a regulatory taking has occurred. *Penn Central* regulatory taking analysis requires the Court to consider the "economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment backed expectations." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-539 (2005), citing *Penn Central*, 438 U.S. at 124.

In the present case, the district court credited reports indicating that Goleta's rent control ordinance required the Guggenheims to rent the entire mobile home park at about an 80% discount below market rates, and 90% of the sale price of mobile homes in the park had been transferred to the incumbent tenants. Even though this finding is particular to this specific property, studies indicate that such redistribution by restrictive mobile home rent control ordinances is fairly standard. *See, e.g.*, Kenneth Barr, *The Right to Sell the "Im" mobile Manufactured Home in Its Rent Controlled Space in the "Im" mobile Home Park: Valid Regulation of Unconstitutional Taking?*, 24 URB. LAW. 157 (1992); Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399 (1988);

Cashman v. City of Cotati, 124 F.3d 1150 (9th Cir. 1997).

The Ninth Circuit, ruling *en banc*, agreed with the district court's finding that Goleta's ordinance does indeed transfer property values from park owners to tenants. *Guggenheim v. City of Goleta,* No. 06-56306, 2010 WL 5174984 at *5 (9th Cir. Dec. 22, 2010) (*en banc*). However, in order to find that Goleta's ordinance nevertheless does not have an unduly burdensome economic impact, the decision below asserts that because the ordinance was in place when the Guggenheims purchased the mobile home park, the ordinance could not have interfered with the Guggenheims' investment backed expectations. When the Guggenheims invested in the park, the Ninth Circuit concludes, they knew that the ordinance would limit their freedom to charge rent at market rates.

But land and laws values are not static. The Goleta ordinance is the one that keeps on giving . . . to the coach owners. The burdens of challenging a governmental regulation are great. The well-healed may mount a challenge so that their property rights may be protected as enforcing the constitutionally-backed expectations requires substantial investment as well. For the many who cannot survive this war of economic attrition, they forfeit their land values by selling to someone who hopes for, and can fund, the fight to stop the shifting of the value of their purchase to others indefinitely. Wiping out constitutional protections due to a purchase of the property gives

undue leverage to cities that ignore constitutional limits on regulatory takings of property.

The Ninth Circuit ignored the ways in which the ordinance *does* interfere with the investment backed expectations of the Guggenheims. As noted in the dissent, the majority disregards the Court's recent holding in *Palazzolo* that an investor can validly expect that a land control measure, in place when he invests, is not necessarily eternal and therefore does not disqualify his claim of regulatory taking. *Palazzolo v. Rhode Island,* 533 U.S. 606, 627 (2001). Justice Scalia, in his concurrence, is even more explicit,

> In my view, the fact that a restriction existed at the time the purchaser took title . . . should have *no bearing* upon the determination of whether the restriction is so substantial as to constitute a taking. The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.

Id. at 637 (Scalia, J., concurring) (*emphasis added*) (internal citation omitted).

In fact, the possibility that Goleta's ordinance might be repealed could easily have factored into the Guggenheim's investment backed expectations. The majority opinion even acknowledges this possibility by conceding that "[t]he Guggenheims might conceivably have paid a speculative premium over the value

that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action." *Guggenheim v. City of Goleta*, No. 06-56306, 2010 WL 5174984 at *5 (9th Cir. Dec. 22, 2010) (*en banc*). Such speculation by the Guggenheims would not have been unreasonable.

VI. GOLETA'S ORDINANCE VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT IS AN ILLEGITIMATE USE OF THE GOVERNMENT'S POLICE POWER: IT DOES NOT CONTROL HOUSING COSTS

The raw wealth transfer has no valid public purpose. While it keeps land rents low, it is not designed to control the ultimate cost of housing, nor does it achieve that end. As stated by the dissent,[4]

> . . . it decides the substantive due process and equal protection claims by citing rent control cases. *But, the Goleta ordinance is not a rent control law for the simple reason that it is not designed to – nor does it – control rents*. It does not just miss the mark because of unintended consequences or inefficient administration. Its very structure was designed and intended not to provide housing rent control, but to transfer wealth

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[4] *Guggenheim v. City of Goleta*, No. 06-56306, 2010 WL 5174984 at *8 (9th Cir. Dec. 22, 2010) (en banc) (Bea, J., dissenting).

> from mobile home park owners to one group of lucky tenants. The measure we deal with here is a wealth transfer, pure and simple, with none of the features of rent control thought legitimate governmental interests. As such, its enforcement violates due process and equal protection. (*Emphasis added*).

In *Carson Harbor Vill. Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*), the United States Ninth Circuit Court of Appeals held:

> A generally applicable rent-control ordinance will survive a substantive due process challenge if it is *designed* to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances. . . . This deferential inquiry does not focus on the ultimate effectiveness of the law, but on whether the enacting body could have *rationally believed* at the time of enactment that the law would promote its objective. (*Emphasis added*).

The Supreme Court has not addressed this issue directly, and at least one justice has clearly indicated that whether or not a rent control ordinance can violate substantive due process remains an open question. *Lingle*, 544 U.S. at 548 (Kennedy, J., concurring). Even using the deferential Ninth Circuit test, the severe rent control regulation adopted by the

City of Goleta fails to meet the requirements of substantive due process.

The history of rent control on residential properties in general provides some insight into this issue. The goal of rent control has been to foster affordable housing by keeping rents in the community lower than otherwise, and also to create stability in housing prices for non-owners. In most cases, this results in wealth transfers as certain people (usually tenants) benefit at the cost of others (typically the landlords or owners). Under a typical residential rent control ordinance, tenants are able to lock in their rents at the prevailing market rates and are then able to keep cost increases at a reasonable rate following procedures laid out in the rent control regulations. In California, the experiment of rent control also included more restrictive types of rent control which were notorious in certain communities, such as Santa Monica, Berkeley, and West Hollywood, where the rents were set below market value even at the outset of the tenancy. Although these rent control ordinances prohibited the payment of "key money" (which was money that the new tenant paid to the past tenant for the opportunity to have a rent controlled unit), such payments still occurred regularly in highly restrictive rent control areas. *See, e.g.*, U.S. Department Of Housing And Urban Development, Report To Congress On Rent Control, p. 10 (1991).

Goleta's ordinance is a perfect example of how a rent control ordinance can work contrary to its stated purpose. In essence, Goleta's ordinance doesn't *really*

make mobile home housing more affordable. It is true that rents paid to park owners by the initial mobile home tenants are lower than market value. But when these lucky few sell their units, they capture the value of the land rents in the purchase. Therefore the purchase price of the mobile home from a previous owner is substantially inflated. New tenants have to prepay for their reduced rents.

Additionally, the high initial cost required to purchase a mobile home from a previous tenant means that fewer mobile home transactions will take place than in a market which has not been distorted by restrictive rent control. Potential buyers may lack the funds to pay such a steep premium up front, even though the transaction would make economic sense for them in the absence of an inflated purchase price. Essentially, this acts as a restriction on ownership transfers of real property that serves no legitimate purpose.

Furthermore, in areas where severe mobile home rent control provisions such as Goleta's have been passed, no new mobile home parks have been built since passage.[5] In fact, given the likelihood of greater returns on other real estate investments, over many years in areas with overly restrictive rent control ordinances, existing mobile home parks are likely to

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[5] *See* Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399 (1988).

go out of business. It is textbook economics that, all else being equal, a reduction in supply will lead to an increase in price. Thus, Goleta's ordinance will ultimately make mobile home housing *less* affordable for non-owners by decreasing the supply of mobile home housing in the long run.

In sum, Goleta's ordinance has the following deleterious secondary effects, none of which promote the supposed goals of rent control: (1) it creates a premium on the purchase price of mobile homes acquired from previous owners; and (2) it reduces the supply of mobile home housing in Goleta, which leads to price increases for prospective buyers. These secondary effects essentially wipe out any beneficial primary effects that the ordinance might have.

The ordinance as adopted was a way to give incumbent mobile home owners an unearned windfall at the expense of park owners and potential mobile home owners. This was an illegitimate use of government power. As stated in the Ninth Circuit *en banc* dissent, "[w]hile the government has authority to tax or encumber citizens for the common good, it cannot violate individual rights merely to enrich a small, private interest group." *Guggenheim v. City of Goleta,* No. 06-56306, 2010 WL 5174984 at *17 (9th Cir. Dec. 22, 2010) (*en banc*) (Bea, J., dissenting).

VII. CONFISCATORY RENT CONTROL SHOULD BE TREATED AS A FACIAL TAKING AS A MATTER OF PUBLIC POLICY

Beyond an analysis using the *Penn Central* factors or substantive due process, certain policy considerations also argue for the idea that rent control which lacks vacancy decontrol should be treated as a facial regulatory taking. The whole concept behind the Takings Clause of the Fifth Amendment to the U.S. Constitution is "that private property shall not 'be taken for public use, without just compensation.'" *Lingle*, 544 U.S. at 536. The courts have made a broad distinction between the physical occupation of property by the government and regulatory confiscation of property, but landowners see both of these situations as equally interfering with the lawful use of their property. Although the government should be allowed some flexibility in order to promote zoning and other legitimate interests, at some point regulatory control becomes as severe (or even more severe) as the physical occupation of the property. No one is arguing for a standard which makes *any* government regulation suspect to challenge, but at some point courts must conclude government regulations go too far even though they do not prohibit *all* economic use of the property.

A number of opinions have suggested that such examination by the courts will open up the floodgates to challenges of government regulations and that the courts are not the proper forum for assessing whether regulations are effective or ineffective. However,

these fears can be allayed with clear guidance about when regulations do indeed go too far. Such guidance will not assess the effectiveness of regulations, but instead will simply determine whether or not a regulation violates individual constitutional rights.

It is in this context that extreme rent control ordinances should be examined. Goleta's mobile home rent control ordinance continues to transfer wealth and value from the park owner to the tenants, gradually yet insidiously. If instead of a gradual transfer, redistributions were made at one time from the park owner to the tenants as a lump sum payment (i.e. park owners were required to pay each tenant $90,000), landowners would certainly have redress in the courts. The advantage of time may make the redistribution more survivable by the park owner and less evident to the public, but it does not hide the fact that the government has made a confiscatory taking of property for which some compensation is due, or which can be remedied by striking down the regulation.

VIII. CONCLUSION

The Ninth Circuit *en banc* dissent, which argued that ordinances such as Goleta's violate the Fifth and Fourteenth Amendments to the Constitution, is the guidance needed to solidify and prevent future unwarranted takings. Even though the mobile home park owner might be receiving some return from the initial investment, the nature of a severe rent control

restriction absent vacancy decontrol ultimately amounts to a near complete exaction of the property owner's economic interest, given enough time. Such ordinances constitute *facial* takings of the property, even if the value is not taken immediately upon the law's enactment.

For all these reasons, the *amicus curiae* urges the Court to grant the *writ of certiorari*.

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IN THE
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DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA, a Municipal Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Takings Clause have an expiration date?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

ARGUMENT 4

I. THIS CASE IS CRITICALLY IMPORTANT FOR PRIVATE PROPERTY RIGHTS 4

A. The Ninth Circuit Decision Places an Expiration Date on the U.S. Constitution's Taking Clause: the Date the Property Changes Hands 5

B. The Ninth Circuit Decision Threatens to Disrupt Real Estate Markets Because Buyers and Sellers Will Know That a Transaction Would Extinguish the Right to a Challenge Under the Takings Clause, Effectively Immunizing Government Regulation from Suit on That Basis 8

II. THE NINTH CIRCUIT IS ADVANCING A MISAPPLICATION OF *PALAZZOLO* WHILE ALSO DEEPENING A CIRCUIT SPLIT 11

A. Other Courts Have Recognized and Applied *Palazzolo* 14

Page

B. The Ninth Circuit Had Abrogated *Palazzolo* Even Before the Instant Case 15

C. The Federal Circuit Had Also Recently Contradicted *Palazzolo* 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott Labs v. CVS Pharm., Inc.,
290 F. 3d 854 (7th Cir. 2002) 14

Appolo Fuels, Inc., v. United States,
381 F.3d 1338 (Fed Cir. 2004)..... 21

Berman v. Parker,
348 U.S. 26 (1954) 6

Carson Harbor Village, Ltd. v. City of Carson,
37 F.3d 468 (9th Cir. 1991) 16

Cienega Gardens v. United States,
331 F. 3d 1319 (Fed. Cir. 2003)..... 20

CRV Enterprises v. United States,
626 F. 3d 1241 (Fed. Cir. 2010)..... 4, 18, 19

Equity Lifestyle Props., Inc., v. County of San Luis Obispo, 548 F. 3d 1184. (9th Cir. 2008)..... 16

Guggenheim v. City of Goleta,
582 F. 3d 996 (9th Cir. 2009) 2, 3, 4

Guggenheim v. City of Goleta, No. 06-56306,
2010 U.S. App. LEXIS 25981 (9th Cir. Dec. 22, 2010).....*passim*

Hansen v. United States,
65 Fed. Cl. 76 (Fed. Cl. 2005)..... 21

Hawaiian Housing Authority v. Midkiff,
467 U.S. 229 (1984) 5

Kelo v. New London,
545 U.S. 469 (2005) 5, 6

Page(s)

Lingle v. Chevron
544 U.S. 528 (2005) 3

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Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)..... 20

Lucas v. S.C. Coastal Counsel, 505 U.S. 1003 (1992) 6

Nollan v. Cal. Coastal Comm'n, 483 U.S. 625 (1987) 6, 7

Norman v. United States, 429 F.3d 1081 (Fed. Cir. 2005)..... 20

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Palazzolo v. State 746 A.2d 707 (R.I. 2000)..... 12, 13

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) 3

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 7

Phillip Morris v. Reilly, 312 F.3d 24 (1st Cir. 2002)..... 14

Pumpelly v. Green Bay Co., 80 U.S. 66 (1872) 7

Rith Energy v. United States, 270 F. 3d 1347 (Fed. Cir. 2001)..... 21

Schooner Harbor Ventures, Inc. v. United States, 569 F.3d 1359 (Fed Cir. 2009) 18

Page(s)

Vanhorne's Lessee v. Dorrance,
2 U.S. 304 (1795) 5

Constitutional Provisions:

U.S. CONST. AMEND. V 5

Other Authorities:

Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047) 10, 11

Brief for W. Frederick Williams, III, and Louise A. Williams on the Merits in Support of Petitioner, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047) 9,10

James S. Burling, *Private Property Rights and the Environment after* Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1 (2002) 17

John A. Kupiec, *Returning top the Principles of "Fairness and Justice:" The Role of Investment-Backed Expectations in Total Regulatory Takings Claims*, 49 B.C. L. Rev. 865 (2008) 17

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

A divided Ninth Circuit *en banc* panel found that Daniel Guggenheim and other plaintiffs here (collectively "Guggenheim") could not prevail on their claim that the City of Goleta's rent control ordinance violates the Fifth Amendment's Takings Clause because they had purchased their mobile home park after the ordinance was enacted. *Guggenheim v. City of Goleta*, 2010 U.S. App. LEXIS 25981 (9th Cir. Dec. 22, 2010). Instead of applying the rule of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which held it improper to bar a takings claim simply because the property at issue was transferred after a regulation's enactment, the court limited *Palazzolo*'s precedential authority to specific factual and procedural settings. *See Guggenheim*, No. 06-56306, 2010 U.S. App. LEXIS, at *18. Such a ruling amounts to an abrogation of *Palazzolo*.

In *Palazzolo*, the Supreme Court laid out the important principle that "a regulation that otherwise would be unconstitutional absent compensation is not transformed [into one that passes muster] by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629. The idea that "the postenactment transfer of title would absolve the State of its obligation to

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief, and have consented to its filing in letters on file with the Clerk's office.

defend any action restricting land use, no matter how extreme or unreasonable" was rejected by the Supreme Court as a rule that would "put an expiration date on the Takings Clause." *Id.* at 627. The Ninth Circuit decision cannot be reconciled with *Palazzolo* because it enforces such an expiration date.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes the annual *Cato Supreme Court Review* and files *amicus curiae* briefs with the courts. This case is of central concern to Cato because it implicates Fifth Amendment protections from regulatory takings and is a departure from foundational Supreme Court decisions protecting those rights.

STATEMENT OF THE CASE

In 1997, Guggenheim bought a mobile home park in what at the time was an unincorporated part of Santa Barbara County and subject to the County's rent control ordinance. In 2002, the City of Goleta incorporated and the park fell within the city's jurisdiction. At the time of incorporation, Goleta adopted the County's laws, including the rent control ordinance. *Guggenheim v. City of Goleta*, 582 F.3d 996, 100 (9th Cir. 2009).

One month after Goleta incorporated, Guggenheim brought a facial challenge to the ordinance claiming violations of the Takings Clause and other constitutional protections. *Id.* at 1002. After some litigation in both the federal district court

and state court, the district court issued summary judgment in favor of Goleta in 2006. *Id.* at 1002-4.

A Ninth Circuit panel reversed, finding that in light of *Palazzolo*, Guggenheim, who purchased the property subject to regulation, could still bring a regulatory takings challenge. *Id.* at 1005-6. The court admitted that it was unclear how the investment-backed expectations would be calculated in the context of the post-enactment purchase. *Id.* at 1026 ("We read *Palazzolo* to mean that even though the Park Owners purchased the Park in a regulated state similar to the one imposed by the City, the Park Owners may still prevail under *Penn Central*. How we are to apply *Penn Central* post-*Palazzolo*, is less clear."); *see also Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("The Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."); *Lingle v. Chevron*, 544 U.S. 528 (2005) ("regulatory takings challenges are governed by *Penn Central* . . . . *Penn Central* identified several factors—including the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action—that are particularly significant in determining whether a regulation effects a taking."). But it emphasized that Guggenheim's post-enactment purchase was not in itself fatal to his challenge and that the case should proceed for a determination of Guggenheim's just compensation, if any was deserved. *Id.* at 1005-6. The panel remanded to the

district court for further proceedings in that regard. *Id.* at 1034.

But that was not the end of the Ninth Circuit's consideration of this case. After rehearing, a divided *en banc* panel reversed the three-judge panel. Focusing on the temporal ordering of the enactment and purchase as well as procedural distinctions between *Palazzolo* and this case, the *en banc* court significantly narrowed *Palazzolo*'s effect. *Guggenheim*, 2010 U.S. App. LEXIS, at *17-29.

REASON FOR GRANTING THE PETITION

This Court should provide much-needed doctrinal certainty by reaffirming *Palazzolo*. It is apparent that the courts of appeal need clarity on whether *Palazzolo* has binding force: this is one of two recent cases where courts of appeal have read *Palazzolo* so narrowly as nearly to read it out of takings jurisprudence. The other case, *CRV Enterprises v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), also has a pending Petition of Certiorari. Guggenheim's petition raises a question that is central to property rights jurisprudence: Does the Takings Clause have an expiration date?

ARGUMENT

I. THIS CASE IS CRITICALLY IMPORTANT FOR PRIVATE PROPERTY RIGHTS.

This case presents several significant issues. The court should consider the following: (1) a rule that allows the transfer of title to immunize government

regulation from constitutional or other legal challenge expands government power and diminishes property rights; (2) in dissent, Judge Carlos Bea, joined by Chief Judge Alex Kozinski and Judge Sandra Ikuta, decried that the Ninth Circuit's *en banc* decision "flouts the Supreme Court's holding in *Palazzolo*"; and (3) this case—as well as *CRV Enterprises*—indicates the need for the Supreme Court to settle the spreading confusion about *Palazzolo*. We begin by explaining why the Court should underscore its disapproval of a rule that would deny subsequent owners the fundamental right to challenge government interference with property ownership.

A. The Ninth Circuit Placed an Expiration Date on the Takings Clause: the Date the Property Changes Hands.

The Fifth Amendment's Takings Clause conditions the taking of private property for public use on the government's provision of just compensation to the affected property owner. U.S. CONST. AMEND. V; *Kelo v. New London*, 545 U.S. 469, 477 (2005). Because courts rarely side against the government in its exercise of eminent domain—"the despotic power"—it is all the more important that owners be properly compensated for the appropriated property. *See generally Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795); *see also Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229, 243-44 (1984) ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be

put into use for the general public."); *Berman v. Parker*, 348 U.S. 26 (1954).

The most tangible example of a taking occurs when the government transfers ownership of land from one party to another—either directly to the government or to a private party who will use the land for a legitimate public purpose. *Kelo*, 545 U.S. at 478. Physical takings involve either the physical occupation or destruction of the property. *See e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Under certain circumstances, the Takings Clause allows a landowner to challenge the government even when it does not physically occupy or destroy the property, but instead diminishes the property's value through regulation. Under this Court's regulatory takings jurisprudence, the government must compensate a plaintiff for the diminution in property value caused by a regulation "so unreasonable or onerous as to compel compensation." *Palazzolo*, 533 U.S. at 627; *see also, e.g.*, *Lucas v. S.C. Coastal Counsel*, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 625, 833 n.2 (1987) ("Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the

lot."); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (compensable taking can occur not only when the government seizes or physically intrudes on land, but also when it enacts a "regulation [that] goes too far" in diminishing its value); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1872) ("There are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.").

This Court has not accepted the view that those who purchase property after a regulation is enacted are, in effect, "on notice" and should be ineligible for compensation. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. at 860 (Brennan, J., dissenting). Instead, faced with a claim from a property owner who purchased land already subject to strict California coastal land use laws, the Court held that just as such a regulation could be challenged by owners at the time of implementation, later owners may also challenge and be compensated. *Id.* at 833 n.2. The Court has made clear that prior owners' full property rights—including the right to challenge an overly burdensome regulation—transfer with title to the property. *Id. See also Palazzolo*, 533 U.S. at 628 ("It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

In *Palazzolo*, this Court explicitly rejected the rule that appellants like Guggenheim—those who purchased property already subject to a regulation—could *per se* have no investment-backed expectations

beyond what was allowed by the regulation, no matter how burdensome. This Court further explained that such a rule:

> would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 627.

In the face of well-settled precedent protecting an individual owner's enduring right to challenge an overly burdensome regulation, the Ninth Circuit's *en banc* decision distinguished these rules, narrowed them significantly, and held that a post-enactment transfer of title eliminates subsequent owners' right to challenge a regulation. *See generally Guggenheim*, 2010 U.S. App. LEXIS, at *17-29. This holding is inconsistent with this Court's precedent, threatens fundamental rights, and should be reexamined.

B. The Ninth Circuit Decision Threatens to Disrupt Real Estate Markets Because Buyers and Sellers Will Know That a Transaction Would Extinguish the Right to a Takings Clause Challenge, Effectively Immunizing Government Regulation from Suit on That Basis.

A rule that causes property rights to change as property changes hands would be disruptive to real estate markets. If one property owner has the right to defend his property against laws enacted during his ownership, his property value will include the

assumption that if an overly burdensome law is enacted, he may successfully challenge the law and either overturn it or be compensated for diminished property value. But all of this is in doubt if he considers selling the property. As a buyer considers purchasing the property, she must look at any regulation, no matter how burdensome, and assume that if she takes title, she cannot challenge it. This deflates her estimate of the property's value. If the owner has a higher subjective value of the property than any potential buyer, this could interfere with the free exchange of real property.

Briefs from *Palazzolo* made these same arguments. An amicus brief on behalf of the petitioner explained that small business owners would suffer in a legal regime *sans Palazzolo*, but large developers with "high-powered legal counsel" would not, as they "might have arranged for the pre-enactment owner to retain legal ownership of the property and act as a figurehead by applying for all permits under his own name until after the property had been completely developed." Brief for W. Frederick Williams, III, and Louise A. Williams on the Merits in Support of Petitioner at 9, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047). The "post-enactment purchaser" theory would invite litigation over the "form of the transaction, the nature of the transfers, and the effect of partial transfers" in that sophisticated buyers and sellers could circumvent the rule through, for example, acquisition by stock purchase. *Id.* at 10.

Individuals and small companies would not have the resources or expertise to protect their investment and development rights, creating a "massive uncompensated taking" from small developers and

investors that would preserve and enhance the rights of large corporations. *Id.* Such a rule would not only lead to litigation, but would stimulate "sprawl" and "premature" or "leapfrogged development." *Id.* at 15, 19. It would also restrain alienation by having the perverse effect of disincentivizing sellers because a seller unwilling to secure development rights would have to sell at a "stern discount" to cover the purchaser's loss of rights. *Id.* at 13-14.

Another brief from *Palazzolo* by the Institute for Justice and Professor Richard Epstein underscores this last point, explaining that the "disregard from the privity rule creates weird incentives that disrupt the sound operation of the real estate market" because if the buyer and seller are aware of the legal situation, "they may postpone an otherwise beneficial transfer in order to protect [the seller's ability to perfect title]," at a social loss presuming the buyer values the land over the seller. Brief of the Institute for Justice as Amici Curiae in Support of Petitioner at 7 n.2, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047).

Buyers may forgo a socially beneficial transaction for fear that the land will become worthless upon transfer of title. Thus, valuable voluntary transactions will be discouraged by an "unsound rule that against all reason treats a sale from X to Y as though it were a gift of X's takings claim to the state." *Id.* at 8. That will instead incentivize idle and unproductive uses of land. Finally, the Institute for Justice and Professor Epstein point to what they call a "knowledge problem": the buyer has "the best information on the adverse effects that the regulation has on his proposed plans for development" but this rule allocates the takings claim to the seller and

former owner who has "no knowledge of the particulars of the dispute, no ongoing interest in the property, and who may not even be alive or in the jurisdiction at the time that the dispute ripens." *Id.* at 10. Both of these *Palazzolo amici* urge that the rule would disrupt real estate and invite a "torrent of lawsuits . . . ." *Id.* at 16.

The negative effects of the decision below on the real estate market and transaction-related litigation could be considerable.

II. THE NINTH CIRCUIT IS ADVANCING A MISAPPLICATION OF *PALAZZOLO* WHILE ALSO DEEPENING A CIRCUIT SPLIT.

The Petitioners recounted the sad *Palazzolo* saga, on which we elaborate here to show how similar facts produced a different result. *Palazzolo* involved plans to develop a piece of waterfront property in Westerly, Rhode Island. 533 U.S. at 611. In 1959, a corporation that would eventually be controlled by petitioner alone purchased three undeveloped parcels of coastal land. The corporation made several attempts to gain approval to develop the property between 1962 and 1966, including submitting applications to state agencies. These applications included requests for permits to fill in substantial portions of the parcel because its unstable, marshy ground was not fit for construction—but they were denied or otherwise not approved. *Id.* at 614. In 1971, the state passed legislation creating a Council charged with protecting coastal property. The Council promulgated regulations designating salt marshes such as those on the corporation's property protected coastal wetlands. *Id.*

Some time after the corporation's thwarted attempt to secure development permits, the corporation failed to pay its income taxes, and its charter was revoked. Pursuant to state law, title to the corporation's property—the newly protected coastal wetland parcels—passed to petitioner, the corporation's sole shareholder. *Id.* In 1983, petitioner, now owner of the property rather than shareholder in the property's corporate owner, renewed efforts to develop the land. Petitioner filed several applications for development permits, but failed on each one. The Council's regulations required that a landowner wishing to fill salt marsh lands be granted a special exception, and the Council proved unwilling to grant petitioner such an exception. *Id.* at 615. After having his attempts to secure permitting frustrated by the Council, petitioner filed suit claiming that the Rhode Island environmental law amounted to an inverse condemnation as applied to his property. The state trial court ruled against petitioner, and he appealed to the Rhode Island Supreme Court. *Id.*

The Rhode Island Supreme Court affirmed the state trial court in relevant part because petitioner had no standing to challenge the regulations predating his acquisition of the property. *Id.* at 616; *Palazzolo v. State*, 746 A.2d 707, 716-17 (R.I. 2000) ("[In 1978], there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision . . . Palazzolo's lack of reasonable investment-backed expectations is dispositive in this case."). The state supreme court's decision in

Palazzolo is particularly germane to the instant case because its flawed reasoning—later overturned by this Court—mirrors the Ninth Circuit's here.

This Court frowned on the Rhode Island Supreme Court's view that "postregulation acquisition was fatal to the claim for depravation of all economic use and to the *Penn Central* claims." *Palazzolo,* 533 U.S. at 626; *Palazzolo v. State*, 746 A.2d at 716-17. These two rules, the Court explained, "amount to a single, sweeping, rule: A purchaser or successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo*, 533 U.S. at 626. In dispatching the reasoning now embraced by the Ninth Circuit, the Court explained:

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation. The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or

> onerous as to compel compensation. . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627.

A. Other Circuits Have Recognized and Applied *Palazzolo*.

In addition to the cases and courts discussed by the Petitioners, at least two other circuit court cases from the past decade faithfully applied *Palazzolo*.

The First Circuit positively cited *Palazzolo* in a trade secrets claim for the premise that under *Penn Central*, "whether property is acquired before or after a regulation is enacted does not completely determine the owner's reasonable investment-backed expectations." *Phillip Morris v. Reilly*, 312 F.3d 24, 37 (1st Cir. 2002).

The Seventh Circuit also expressed support for *Palazzolo*'s rule in *Abbott Labs v. CVS Pharm., Inc.*, 290 F.3d 854, 860 (7th Cir. 2002), citing *Palazzolo* for the proposition that "a takings claim survives transfer of the property to a new owner." Indeed in *Abbott Labs*, Judge Frank Easterbrook expressed confusion as to why this rule was not self-evident. *Id.*

Both of these circuits unambiguously hold that *Palazzolo* forecloses the "post-enactment" theory.

B. The Ninth Circuit Had Abrogated *Palazzolo* Even Before the Instant Case.

Palazzolo cannot be reconciled with the Ninth Circuit's decision here. The Ninth Circuit explained that because the rent control ordinance was "a matter of public record, the price [Guggenheim] paid for the mobile home park doubtless reflected the burden of the rent control [he] would have to suffer." *Guggenheim*, 2010 U.S. App. LEXIS, at *23. And further implying that timing is dispositive, the Ninth Circuit opined that "[w]hatever unfairness to the mobile home park owner might have been imposed by rent control, it was imposed long ago, on someone earlier in the Guggenheims' chain of title." *Id.* at *27.

How does the Ninth Circuit arrive at a decision that so contravenes this Court's holding in *Palazzolo*? As Judge Bea explains in dissent to the *en banc* opinion, the court relied on two illusory distinctions. First, Judge Bea notes the majority's focus on the distinction between an as-applied challenge and a facial challenge in the regulatory takings context:

> Why should the investment-backed expectations of a land owner bringing a facial challenge be analyzed differently from those of an as-applied claimant? If the *expectations* are valid and are expropriated, what does it matter as to their existence that they will be injured in all cases (facial challenge) or just in some (as-applied challenge)? Either they are valid expectations or they aren't.

Id. at *49 (Bea, J., dissenting).

Second, Judge Bea explains that the majority's distinction between *Palazzolo*, where the post-enactment owner acquired ownership by operation of

law, and this case, where Guggenheim acquired ownership through an open market purchase, is another distinction without legal significance. *Id.* at 48-49 ("These 'distinctions' are mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California."). Judge Bea is correct to recognize that these distinctions should not absolve the Ninth Circuit of its obligation to follow *Palazzolo*.

But *Guggenheim* is not an aberration for the Ninth Circuit. Two years earlier, the Ninth Circuit acknowledged that one of its related decisions might be inconsistent with *Palazzolo* but declined to decide whether the law of the circuit was overruled on the grounds that such a ruling was not necessary for the decision. *See Equity Lifestyle Props., Inc., v. County of San Luis Obispo*, 548 F.3d 1184, 1190 (9th Cir. 2008) (citing *Palazzolo*, 533 U.S. at 630). The Ninth Circuit effectively ignored *Palazzolo* by declining to decide whether *Palazzolo* overruled the case of *Carson Harbor*, where it had decided that the subsequent purchaser "has no standing to assert facial claims based on the loss of the premium and the loss of the right to dispose of property." *Carson Harbor Village, Ltd. v. City of Carson* 37 F.3d 468, 476 (9th Cir. 1991). The Ninth Circuit recognized that *Carson Harbor* was at odds with *Palazzolo*, where the Court stated that "where the State actor could not have deprived the prior owners of the property right at stake 'the prior owners must be understood to have transferred their full property rights in conveying the lot.'" *Palazzolo*, 533 U.S. at 629; *Equity Lifestyle Props.*, 548 F.3d at 1190.

The Ninth Circuit has so significantly limited *Palazzolo*'s reach as to revert back to the pre-

Palazzolo uncertainty regarding whether a post-enactment purchaser may challenge a regulation burdening his property. Both the *Palazzolo* majority and Justice Sandra Day O'Connor in concurrence were clear that notice of the regulation cannot be sufficient to defeat a takings claim—and yet the Ninth Circuit decision in this case says just that. *See* John A. Kupiec, *Note: Returning to the Principles of "Fairness and Justice:" The Role of Investment-Backed Expectations in Total Regulatory Takings Claims*, 49 B.C. L. REV. 865, 886 (2008) (explaining that in *Palazzolo*, the Supreme Court rejected the idea that notice of a regulation can alone be fatal to a takings claim and noting that Justice O'Connor's concurrence suggests that although the Court will not deny compensation solely on notice, it will consider the prior existence of a regulation when conducting the factual inquiry into the regulation's inherent fairness and the plaintiff's expectations); *Palazzolo*, 533 U.S. at 634-36 (O'Connor, J., concurring) ("Investment-backed expectations, though important, are not talismanic under *Penn Central* . . . . Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any 'set formula.'"). *Palazzolo* put to rest "once and for all the notion that title to property is altered when it changes hands." James S. Burling, *Private Property Rights and the Environment after* Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1 (2002). This Court should not let the Ninth Circuit disturb that finality.

C. The Federal Circuit Also Recently Contradicted *Palazzolo.*

While, as the Petitioners note, the Federal Circuit is one of the courts to have ruled opposite the Ninth Circuit, *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), that court also recently issued an opinion that is inconsistent with *Palazzolo*: *CRV Enterprises*, 626 F.3d at 1241. *Amicus* will also be submitting an *amicus curiae* brief supporting the petition for writ of certiorari in that case, which involves a complex procedural background but similarly disregards *Palazzolo*.

CRV Enterprises concerns a strip of navigable water—a "slough"—near an Environmental Protection Agency Superfund Site in Stockton, California. Between 1942 and 1990, a wood-preserving plant operated at the southern shore of the slough, across from property later purchased by CRV. Wood preserving releases hazardous chemicals, and during the plant's period of operations, it released significant quantities of such chemicals into the soil. Some of this contaminated soil settled to the bottom of the slough. In 1992, the EPA designated the site a Superfund National Priority. From 1992 to 1999, the EPA studied the Superfund site and its surroundings, and in March 1999 it issued findings. The findings—issued as a Record of Decision—called for the slough to have at least two feet of sand added to its bottom to cap contaminated sediment and for various restrictions to be placed on access to it. Despite these findings, no action was taken for some years thereafter. *Id.* at 1244.

In 2000, CRV arranged to purchase a tract of land bordering the slough and across from the Superfund

Site to build a marina, boat slips, storage facilities, and sales and service outlets. CRV was aware of the EPA's remediation plans, including its plan to restrict access to the slough and cap it to contain the contaminated sediment. In spite of the ongoing concerns about the EPA's planned action, CRV finalized its purchase of the site in 2002. *Id.* at 1245.

In 2006, seven years after the EPA issued its findings calling for remediation of the site, the EPA finally placed a log boom across the slough, thereby obstructing access to CRV's planned marina. CRV sued the EPA in the Court of Federal Claims, complaining that the installation of the boom amounted to a Fifth Amendment taking. That suit was eventually dismissed on the ground that no physical taking had occurred and any regulatory claim was barred either by the statute of limitations or for want of standing because the EPA had issued its Record of Decision on the slough remediation before CRV purchased the property. *Id.* at 1245.

On appeal, the Federal Circuit dismissed CRV's claim for lack of standing because CRV did not acquire the property until after the EPA issued its ruling. The court explained that "[i]t is well established that only persons with a valid property interest at the time of the taking are entitled to compensation." *Id.* at 1249 (internal quotations and citations omitted). The Federal Circuit distinguished *Palazzolo* by explaining that there the takings claim did not ripen until the development application was rejected (during petitioner's ownership), whereas in *CRV Enterprises*, the claim ripened when the EPA issued its Record of Decision (before petitioner's ownership). *Id.* at 1250. As here, the court side-stepped *Palazzolo* by focusing on facts that this Court

never described as particularly relevant to its decision and ignoring this Court's announced rule that post-enactment purchase does not forestall a takings claim.

The Federal Circuit had suggested limitations on *Palazzolo* in 2005, finding that although a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction," it is "particularly difficult to establish a reasonable investment-backed expectation in circumstances like these." *Norman v. United States*, 429 F.3d 1081, 1093 (Fed. Cir. 2005). Like the Ninth Circuit, the Federal Circuit cited an earlier decision that the "purpose of consideration of plaintiffs' investment-backed expectations . . . is to limit recoveries to property owners who can demonstrate that they 'bought their property in reliance on a state of affairs that did not include the challenged regulatory'" regime. *Cienega Gardens v. United States*, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994)).

Of course, the Federal Circuit did not rule in this manner in the immediate aftermath of *Palazzolo*. As Petitioners note, just after *Palazzolo* came down, the court stated:

> Neither *Palazzolo* nor *Nollan* holds that investment-backed expectations are irrelevant in analyzing a regulatory taking. The *Palazzolo* Court rejected the argument that when governmental action regulates the use of property, a person who purchases property after the date of the regulation may never

> challenge the regulation under the Takings Clause.

Rith Energy v. United States, 270 F.3d 1347, 1350 (Fed. Cir. 2001). Specifically, the Federal Circuit seemed largely to agree with Justice O'Connor's *Palazzolo* concurrence that while the Court rejected a "blanket rule," the holding did not mean "that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis." *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

As the Federal Circuit explained in another case, the court focused on Justice O'Connor's concurrence because the majority opinion did not address the "bearing of the regulatory environment at the time of land acquisition on the reasonable investment-backed expectations prong of the Penn Central analysis." *Appolo Fuels, Inc., v. United States*, 381 F.3d. 1338, 1348 (Fed. Cir. 2004); *see also Hansen v. United States*, 65 Fed. Cl. 76, 130 (Fed. Cl. 2005) (viewing *Palazzolo* as standing for the premise that "takings claims could be transferred only if the claim had not yet ripened"). The statement from *Norman* suggesting it is "particularly difficult to establish" reasonable investment-backed expectations in such circumstances seems inconsistent with this previous interpretation of *Palazzolo*.

* * *

Even though the Ninth Circuit here (like the Federal Circuit in *CRV Enterprises*) was fully aware of *Palazzolo*, it applied that case in a manner that conflicts with several other courts and is irreconcilable with this Court's jurisprudence. Given the recent cases where courts of appeal have failed to

follow precedent, this Court should grant *certiorari* to settle the apparent confusion about *Palazzolo* and reaffirm that the Takings Clause does not expire when title to property transfers.

CONCLUSION

For these reasons, and those stated by petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND REASON FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In *Penn Central*, this Court held that regulations designed to draw a public benefit from private property would not be treated as regulatory takings subject to the just compensation clause of the Fifth Amendment if the public benefit significantly outweighed the investment-backed expectations of the private property owner subjected to the regulation. Yet this Court also reiterated that the principal purpose of the Fifth Amendment is to prevent "some people alone [from] bear[ing] public burdens which, in all fairness and justice, should be borne by the public as a whole." A number of legal scholars have subsequently noted that a broad reading of the *Penn Central* balancing test undermines that purpose, and in this case, the Ninth Circuit upheld a regulatory taking that demonstrably does not provide *any* public benefit, simply transferring a significant property right from one private owner to another, merely because the regulation was in place when the current property owner purchased the regulated property.

1. Does this Court's decision in *Palazzolo* foreclose the holding of the Ninth Circuit below?

2. Did the Ninth Circuit misapply *Penn Central*'s three-factor test to accomplish an end-run around *Palazzolo*?

3. Should *Penn Central*'s balancing test be clarified so that non-nuisance-preventing regulations that yield benefits for the public are treated as takings, in order to more closely comport to the purpose served by the Fifth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

REASONS FOR GRANTING THE WRIT 2

I. If Allowed to Stand, the Ninth Circuit's Decision Would Neuter this Court's Decision in *Palazzolo*. 2

II. The Ninth Circuit's Reliance on *Penn Central*'s "Investment-Backed Expectations" Factor to End-Run *Palazzolo* Highlights the Incoherence of the *Penn Central* Test. 3

III. Balancing the Public Benefits against Private Property Owners Investment-Backed Expectations Turns the Fifth Amendment's Purpose On Its Head 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Armstrong v. United States,
364 U.S. 40 (1960) 5, 8

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) ..... passim

Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978) ..... passim

Statutes

U.S. Const. Amend. V (Takings Clause) ..... passim

Other Authorities

Barros, D. Benjamin, The Police Power and the Takings Clause, 58 U. MIAMI L. REV. 471 (2002) ... 3

Carpenter, David, et al., *Looking Back on* Penn Central: *A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. J. 287 (2004) 6

Claeys, Eric R., *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339 (2006) 3

Echeverria, John D., *Making Sense of Penn Central*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10471 (2009) 4

Rose, Carol M., *Mahon Reconstructed: Why the Takings Issue Is Still A Muddle*, 57 S. CAL. L. REV. 561 (1984) 3

Wade, William W., *Penn Central's Ad Hocery Yields Inconsistent Takings Decisions*, 42 URB. LAW. 549 (2010) 3

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Curiae Center for Constitutional Jurisprudence,[1] is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005), and *Rapanos v. United States*, 547 U.S. 715 (2006).

Amicus Curiae Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing ***Reason*** magazine, as well as commentary on its websites, reason.com, reason.org, and reason.tv, and by issuing

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[1] Pursuant to this Court's Rule 37.2(a), all parties received the requisite 10-day notice and have consented to the filing of this brief. Blanket letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases, such as this, that raise significant constitutional issues involving protection of property rights.

REASONS FOR GRANTING THE WRIT

I. If Allowed to Stand, the Ninth Circuit's Decision Would Neuter this Court's Decision in *Palazzolo*.

The en banc decision of the Ninth Circuit below quite clearly refused to give credence to this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). As Petitioners have aptly pointed out, and as the dissenting opinion noted as well, *Palazzolo* held in no uncertain terms that a purchaser of property burdened with a regulation does not lose the ability to challenge the regulation as an unconstitutional taking, but rather inherits the cause of action from the predecessor in interest. *Palazzolo*, 533 U.S. at 627. The minor factual differences between the *Palazzolo* and the case at bar are differences of no moment, certainly not grounds for distinguishing *Palazzolo* on the relevant legal inquiry. *Amici* agree with Petitioners that certiorari is warranted for that reason, as well as the fact that the Ninth Circuit is now at odds with a number of sister Court's in its innovative interpretation of *Palazzolo*.

II. The Ninth Circuit's Reliance on *Penn Central*'s "Investment-Backed Expectations" Factor to End-Run *Palazzolo* Highlights the Incoherence of the *Penn Central* Test.

Although *Amici* agree that the Ninth Circuit decision below completely misconstrued this Court's decision in *Palazzolo*, the Ninth Circuit was able to do this end-run of *Palazzolo* because of the underlying incoherence in the test that was first set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and has now been so broadly interpreted by some lower courts as to provide fodder for mischief of the kind manifested by the court below.

Critiques of the *Penn Central* test are legion. Just this past year and referencing this very case, among others, William Wade noted that "application of the *Penn Central* test . . . remains in disarray." William W. Wade, *Penn Central's Ad Hocery Yields Inconsistent Takings Decisions*, 42 URB. LAW. 549, 549 (2010). "The three-part test has come under considerable criticism," with the dominant criticism holding "that the test is incomprehensible." Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 342 (2006). There is "widespread confusion" about it. D. Benjamin Barros, *The Police Power and the Takings Clause,* 58 U. MIAMI L. REV. 471, 471 & n.1 (2002). It is a "muddle." Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984). There is a "widespread view that regulatory takings is an especially confused field of law." John D. Echeverria, *Making*

Sense of Penn Central, 39 ENVTL. L. REP. NEWS & ANALYSIS 10471 (2009).

Because of this muddled confusion, the Ninth Circuit was able to pitch its end-run of *Palazzolo* in some of the language of the *Penn Central* test, namely, the "primary factor" that courts should consider "the extent to which the regulation has interfered with investment-backed expections." Pet. App. 18a. The fact that Guggenheim purchased the property at issue with the rent control restrictions in place was "fatal" to Guggenheim's takings claim, the court held. The loss of $10,000 per year in rents, and the transfer of more than $100,000 in property value from the landowner to the mobile home owners who were tenants on the land, "had happened before the Guggenheim's bought the mobile home park." That lost value was therefore no part of the Guggenheim's "distinct investment-backed expectations." Pet. App. 18a-19a.

Obviously, something is amiss if the lower courts are able to utilize language in the *Penn Central* three-factor test to negate a subsequent holding of this Court. As Professor Echeverria has noted, this Court "has provided little guidance on the meaning and proper application of these three factors, perpetuating the essentially ad hoc approach to takings analysis. . . ." Echeverria, *Making Sense of Penn Central*, 39 Envtl. L. Rep. News & Analysis at 10471. As a result, "the *ad hoc Penn Central* analysis has appeared to mask, if not intellectual bankruptcy, . . . at least considerable uncertainty about the fundamental parameters of takings law." *Id.* at 10472.

"If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intui-

tion, it is imperative to clarify the meaning of *Penn Central*." *Id.* This Court should grant the petition and schedule full briefing and oral argument to correct not just the Ninth Circuit's clear error of failing to follow *Palazzolo*, but the broader and more fundamental error in its application of the *Penn Central* balancing test.

III. Balancing the Public Benefits against Private Property Owners Investment-Backed Expectations Turns the Fifth Amendment's Purpose On Its Head.

There is an even more profound problem with how the *Penn Central* test is being applied that is highlighted by the Ninth Circuit's opinion below. By interpreting the *Penn Central* factors to permit regulations that restrict a non-nuisance use of private property in order to advance some public benefit, decisions like that of the Ninth Circuit below have allowed the *Penn Central* three-factor test to turn the protections of the Takings Clause on their head.

As this Court has repeatedly recognized, including in *Penn Central* itself, the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Penn Central*, 438 U.S. at 123-24; *see also id.* at 139 (Rehnquist, J., dissenting) ("The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of 'landmarks' within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties"). This aspect of the Takings

Clause provides protection of individual rights from raw majoritarian rule.

The *Penn Central* three-factor test, as it has come to be interpreted in cases such as the opinion of the Ninth Circuit below, severely undercuts that protection. *Penn Central* was not meant to have such a sweeping reach. As Justice Brennan's own lead law clerk on the case, David Carpenter, has acknowledged, the opinion was meant to be narrow, "making modest efforts to bring a little content to an area of law that was . . . then quite formalist and in disarray." David Carpenter et al., *Looking Back on* Penn Central: *A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. J. 287, 307-08 (2004).

Justice Brennan's "modest" effort to bring some content to regulatory takings has taken the lower courts down irrelevant and pernicious paths of inquiry. The economic impact of the regulation to the private property owner, and particularly the extent to which the regulation has interfered with his investment-backed expectations, when considered apart from whether a particular regulation is designed to prevent harmful uses of the private property, is really more relevant to damages and therefore the "just compensation" prong of the Takings analysis than the initial inquiry into whether a taking has occurred at all.

When those economic impacts are balanced against the benefit that the government will derive from its regulations,[2] the *Penn Central* test lends it-

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[2] Although Justice Brennan's formulation of the three-factor test in *Penn Central* speaks of "the character of the government

self to the very abuse that the Fifth Amendment was designed to protect against. Indeed, the larger the benefit to be gained for the public (or, worse, a private benefit for a discreet segment of the public, as is the case here), the more tempted government will be to impose economic impacts on individual property owners through regulations designed to grab that benefit without having to pay for it.

This case provides ample example of what has gone wrong with Takings Clause analysis under *Penn Central*. A discreet segment of the population (mobile home owners) was able to obtain a financial windfall by securing from the local government a regulation that imposed a massive economic impact on a necessarily much smaller segment of the population (the mobile home park owners, including Petitioner Guggenheim, who rented land to multiple mobile home owners). Evidence introduced in the trial court showed that the ordinance forced Guggenheim to rent "at close to an 80 percent discount below the market rate." Pet. App. 100a, 122a. The present value of that below-market rent, locked in as it was by local ordinance, resulted in a massive transfer of value from Guggenheim to the mobile home owners of more than $100,000 each. See Pet. App. 8a-9a, 18a (noting Guggenheim's expert testimony that the

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action," he expands upon that to note that interferences with the use of private property which arise "from some public program adjusting the benefits and burdens of economic life *to promote the common good*" would be permissible. *Penn Central*, 438 U.S. at 124 (emphasis added). The fact that New York City's "Landmarks Preservation Law" was designed to "benefit its citizens in a variety of ways," *Penn Central*, 438 U.S. at 109, was thus balanced against the economic impacts to the individual property owners.

resale value of an individual mobile home was $14,000 without the rent control ordinance, but $120,000 with the ordinance).

As Judge Bea correctly noted in his dissent below, the "designed structure and working of the ordinance amounts to nothing more than a wealth transfer from the landowner to the original tenant, and indisputably does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home." *Id.* at 44a. Even if a general public benefit had been obtained by this ordinance, it is hard to imagine a regulatory scenario that more runs afoul of the Fifth Amendment's purpose of "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *Penn Central*, 438 U.S. at 123-24. That the benefit here was grabbed by a discreet segment of the population for purely private gain makes the problem even worse.

Because *Penn Central*'s ad-hoc, three-factor balancing test can be used, as it was in this case, to uphold the very abuses that the Fifth Amendment was designed to prohibit, clarification of *Penn Central* is both warranted and long overdue. Granting certiorari in this case would provide that much needed opportunity.

CONCLUSION

The petition for writ of certiorari should be granted, and the questions presented reformulated to allow this Court to address not just the Ninth Circuit's *Palazzolo* error but the lingering confusion over the *Penn Central* three-factor balancing test that led to it.

Respectfully submitted.

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185

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IN THE
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Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EQUITY LIFESTYLE PROPERTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Majority Opinion Is Inconsistent With The Court's Ruling In *Palazzolo v. Rhode Island* 3

A. *Palazzolo* Requires Reversal Of The Majority Decision Holding That A Property Purchaser May *Never* Reasonably Expect A Change In Existing Law. 5

B. The Expectation That A Regulation May End Is Particularly Reasonable Where The Regulation Is Otherwise Constitutionally Suspect. 7

C. The Majority Opinion Erroneously Departed From *Palazzolo* By Presuming That Any Expectation Of A Change In Regulation Was Speculative 10

II. The Majority Opinion Is Inconsistent With *Penn Central* Because It Focuses Exclusively On One Factor. 12

A. The Goleta Ordinance Has A Severe Economic Impact On The Value Of The Guggenheims' Property. 14

B. The Character Of The Goleta Ordinance Provides Grounds For Finding A Regulatory Taking. 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004), *withdrawn on grant of reh'g*, 415 F.3d 1027 (9th Cir. 2005) 8

Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003) 15

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), *abrogated by*, *Yee v. City of Escondido*, 503 U.S. 519 (1992) 8

Keystone Bituminous Coal Association v. De Benedictis, 480 U.S. 470 (1987) 16

Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005) 2, 9, 13, 16

MHC Financing Limited v. City of San Rafael, No. C-00-03785, 2008 WL 440282 (N.D. Cal. Jan. 29, 2008) 1

MHC Financing Limited v. City of San Rafael, No. C-00-03785, slip op. (N.D. Cal. Apr. 17, 2009) 1-2

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 16

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 2, 5, 6, 7, 11

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 1, 2, 7, 13, 16, 17

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 16

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 14

Yee v. City of Escondido, 503 U.S. 519 (1992) 8, 16, 17

INTEREST OF AMICUS CURIAE

Equity LifeStyle Properties, Inc. ("ELS") is a real estate investment trust, or REIT, and is publicly traded on the New York Stock Exchange. ELS owns and operates approximately 300 land lease manufactured home communities (*i.e.*, mobilehome parks) in approximately 30 states, including California.[1]

ELS has a strong interest in this appeal as a California manufactured home park owner and as a litigant. Formerly known as Manufactured Home Communities, Inc. ("MHC"), ELS brought a federal court challenge to a mobilehome rent control law enacted by the City of San Rafael, California. Following an extensive trial, the district court found that the City's application of that law to MHC's mobilehome park constituted an unconstitutional private taking and a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *MHC Financing Limited v. City of San Rafael*, No. C-00-03785, 2008 WL 440282, at *17, *25 (N.D. Cal. Jan. 29, 2008). The district court issued a judgment that invalidated that law and phases it out over time. *MHC Financing Limited v. City of San Rafael*, No. C-00-03785, slip op. at 24-25

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[1] No counsel for a party authored this brief in whole or part and no party or counsel for a party made a monetary contribution to the preparation or submission of this brief. No one other than *amicus curiae* made such a monetary contribution. Counsel of record for all parties received timely notice of amici's intention to file this brief, and all parties have consented to its filing.

(N.D. Cal. Apr. 17, 2009). The City of San Rafael has appealed and the case is currently pending before the U.S. Court of Appeals for the Ninth Circuit.

The district court's decision in the *San Rafael* case illustrates a proper application of *Penn Central* standards. Although ELS's constitutional claims differ in certain respects from the Petitioners' claims, ELS has an interest in the proper application by the Ninth Circuit of *Penn Central* standards.

ELS was an amicus in earlier stages of the present case. ELS contends that the Ninth Circuit's holding is contrary to this Court's precedents and the many federal and state appellate decisions that have followed this Court's precedents, and urges the Court to grant the Petition.

SUMMARY OF ARGUMENT

"[W]hile property may be regulated to a certain extent, if [the] regulation goes too far[,] it will be recognized as a taking." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.)). As this Court confirmed in *Lingle*, to determine if a regulation goes too far, a court should balance three factually-intensive factors that were identified in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978): the regulation's economic impact, its interference with investment-backed expectations, and its character. In addition, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court held that it is erroneous to find a lack of substantial interference with investment-backed expectations just because the property owner

acquired the property after the challenged regulation was in place.

The Ninth Circuit's decision in this case ignored all of these principles. First, it directly contravened *Palazzolo* by holding that, in the context of a facial *Penn Central* claim, a regulation that was enacted before a purchase of property can *never* interfere with the property owner's reasonable expectations. A more direct conflict with a decision of this Court is difficult to imagine.

Second, the Ninth Circuit decision also is fundamentally inconsistent with *Penn Central*'s rules that a court must weigh all three *Penn Central* factors. The majority opinion did violence to the very purpose of the *Penn Central* multi-factor balancing test by ruling that the investment-backed expectation factor alone is sufficient to foreclose a facial *Penn Central* claim and that it is not necessary even to consider or balance the other two established *Penn Central* factors.

ARGUMENT

This Court should grant certiorari and confirm that the Ninth Circuit has fundamentally misstated the governing constitutional principles for determining whether a regulatory taking has occurred.

I. The Majority Opinion Is Inconsistent With The Court's Ruling In *Palazzolo v. Rhode Island*

In clear and direct contravention of the Supreme Court's ruling in *Palazzolo*, the Ninth Circuit held as

a matter of law that the Goleta rent control regulation did not, on its face, unduly interfere with the Guggenheims' investment-backed expectations, because the Guggenheims bought their property after the regulation was in effect.

The Ninth Circuit ruling directly contravened *Palazzolo*, which establishes that a purchasing property owner with notice of a regulation may reasonably expect that regulation to change. That expectation is particularly reasonable where, as in this case, the regulation is otherwise constitutionally suspect. The Ninth Circuit found that a property purchaser could never reasonably expect that an existing regulation will change even though the Guggenheims had offered substantial evidence, in opposition to summary judgment, that they did have reasonable expectations that the Goleta rent control regulation would not survive. The Ninth Circuit majority did not quarrel with the sufficiency of the Guggenheims' proof; rather, it found that the facts regarding the Guggenheims' expectations were irrelevant based on a categorical rule that a pre-existing law exclusively and irrebuttably defines expectations. In entering summary judgment against the Guggenheims despite their evidentiary submissions, the majority adopted an untenable rule that contravenes *Palazzolo* and neglected to evaluate all the evidence of the Guggenheims' expectations.

A. *Palazzolo* Requires Reversal Of The Majority Decision Holding That A Property Purchaser May *Never* Reasonably Expect A Change In Existing Law.

As the dissent aptly recognized, the Ninth Circuit majority opinion "flouts the Supreme Court's holding in *Palazzolo* that a 'postenactment transfer of title [does not] absolve the [government] of its obligation to defend' the restrictions a regulation imposes on property-owners." Pet. App. 46a (citing *Palazzolo*, 533 U.S. at 627; alterations in original). The court's decision "could be a logical conclusion to reach – but only were one to ignore (1) the instructions of the Supreme Court, (2) decades of political, legal, and economic developments, and (3) the actions of the Guggenheims." Pet. App. 34a. Thus, the dissent correctly recognized that the "distinctions" of *Palazzolo* that the majority identified are "mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California." Pet. App. 36a-37a (footnote omitted).

In *Palazzolo*, this Court explicitly held that landowners are not barred from establishing interference with investment-backed expectations simply because a regulation was in effect when they took title to their land. 533 U.S. at 627. The Court explained:

> Were we to accept the State's rule [that appellants had no investment-backed expectations because the ordinance was enacted before they purchased the land], the

> postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

533 U.S. at 627 (emphasis supplied).

The majority opinion "assumes the eternal validity without reform, of the so-called rent control ordinance." Pet. App. 35a. Contrary to the majority opinion, courts must "analyze a claimant's investment-backed expectations as if the regulation at issue could be repealed at any time." Pet. App. 37a (citing *Palazzolo*, 533 U.S. at 637). It is objectively reasonable for a landowner to believe that, over time, conditions can change and he will be able to collect rents that reflect market conditions. As Justice Scalia noted in his concurring opinion in *Palazzolo*, "the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." 533 U.S. at 637 (Scalia, J., concurring).

The majority opinion artificially limited *Palazzolo* to cases involving as-applied claims. Pet. App. 14a-15a. But *Palazzolo*'s rationale applies with equal force to facial *Penn Central* claims. This Court's recognition in *Palazzolo* that it is reasonable to expect a regulation may change is just as relevant to

facial claims as it is to as-applied claims. The majority opinion cited no legal authority to justify its view that, in connection with a facial claim, a court should assume that a pre-existing regulation is static and immutable. There is no logical or precedential basis for this artificial limitation on this Court's ruling in *Palazzolo*.

B. The Expectation That A Regulation May End Is Particularly Reasonable Where The Regulation Is Otherwise Constitutionally Suspect.

The expectation that a regulation may be eliminated is particularly reasonable where, as in this case, the regulation itself is otherwise constitutionally suspect. "The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives to property of so much of its value as to be unconstitutional." 533 U.S. at 637 (Scalia, J., concurring).

Regardless whether they mount a facial or as-applied challenge and regardless whether the property at issue was acquired through a traditional purchase or some other type of transaction, landowners like the Guggenheims can have a valid and reasonable expectation that an unfair and unduly burdensome law will not continue in effect indefinitely. As property owners, they should not be required to forfeit their reasonable expectations merely because government enacts or enforces an arbitrary regulation. *See Penn Central*, 438 U.S. at 136.

It was particularly reasonable for the Guggenheims to believe that the courts might end enforcement of Goleta's form of mobilehome rent control for several reasons. First, as the dissent pointed out, "[l]egal uncertainty over rent control has been particularly marked in California. . . . The Guggenheims and the prior owners of their mobilehome park may have reasonably thought the state would abolish rent control – or at least vacancy control – for mobile home parks." Pet. App. 40a. As the dissent further noted, some California legislators have taken steps to repeal and reform rent control laws in the past and support for repeal efforts is significant. *Id.*

Second, the original panel decision in *Guggenheim* is the *third* time that the Ninth Circuit has held that certain mobilehome rent control ordinances amounted to an unconstitutional taking. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1280 (9th Cir. 1986) and *Cashman v. City of Cotati*, 374 F.3d 887, 897 (9th Cir. 2004). Although in prior instances the Supreme Court later clarified the applicable legal standards, the underlying vices that gave rise to this Court's constitutional concerns have not changed.[2] In each case, the Ninth Circuit

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[2] In *Hall*, 833 F.2d at 1280, this Court found a rent control ordinance amounted to a physical taking. The Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519, 526-27 (1992), later clarified that the challenged ordinance could not be classified as a physical taking, but it also found that the same ordinance might constitute a regulatory taking. In *Cashman*, 374 F.3d at 897 (vacated on other grounds by 415 F.3d 1027 (9th Cir. 2005)), the court found that the City of Cotati rent control ordinance constituted an unconstitutional regulatory taking

concluded that a rent control regulatory scheme improperly infringed on a property owner's constitutional rights.

Third, it was particularly reasonable for the Guggenheims to expect an end to the Goleta rent control law because the regulation fully capitalized all rent control savings at the time the Ordinance became effective and required incoming residents to pay in full for the value of those "benefits." That is so because, as the summary judgment record established and the Ninth Circuit majority acknowledged, Pet. App. 31a, once the rent control ordinance became effective, mobilehome owners in the City of Goleta were able to increase the sale price of their homes in an amount equal to the present value of the amount by which the ordinance was expected to hold rents below market rent levels, thereby transferring over 80% of the value of the park owner's land to the homeowners who happened to be in place at the time the ordinance became effective. As a consequence, the law does not make housing more affordable to residents who come into the mobilehome park after the ordinance became effective, who had to pay a premium on the price of their homes equal to the rent savings mandated by the rent control ordinance. The law thus confers no public benefit and serves no public purpose. As Judge Bea's dissent explained, the structure of the

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under the "failure to substantially advance" theory. The Supreme Court in *Lingle*, 544 U.S. at 536, did not dispute the underlying facts of the case, but ruled that *Penn Central* set forth the more appropriate legal standard to apply to a regulatory taking.

Goleta ordinance itself prevents the law from achieving its stated purpose of protecting mobilehome tenants from unreasonable rents. Pet. App. 40a-41a (citing Mason & Quigley, 16 J. Housing Econ. 192, 205 and noting that economists have criticized regulatory schemes like the Goleta ordinance in that "virtually all of the economic benefits from lower regulated rents are paid out annually to finance the higher sales prices commanded by those dwellings"). Mobilehome park owners are singled out to bear the entire burden of the wealth transfer that the Goleta rent control ordinance effects for the benefit of a discrete group of private citizens – the mobilehome tenants who happened to reside in the park at the time the rent control ordinance became effective.

A property owner in California could reasonably expect, given the demonstrated failure of this type of mobilehome rent control to advance any public purpose, that rational legislators would repeal such laws and/or courts would enjoin their continued application.

C. The Majority Opinion Erroneously Departed From *Palazzolo* By Presuming That Any Expectation Of A Change In Regulation Was Speculative.

Without benefit of a trial, the Ninth Circuit majority concluded that the Guggenheims' belief that their land would not be burdened indefinitely by the Goleta rent control ordinance was unreasonably speculative as a matter of law. Pet. App. 19a. That conclusion was not only fundamentally inconsistent

with the legal standards for determining reasonable expectations as established in *Palazzolo*, it also granted summary judgment in the face of genuinely disputed material facts.

The majority effectively required the Guggenheims to prove, in order to establish interference with investment-backed expectations, that their purchase price had been materially increased by an expectation that they would recoup the value that had been taken from the land by the regulation. Pet. App. 19a-20a. The majority then presumed, without evidence, that a prospective change in the law was not sufficiently "probable" to "materially affect the [purchase] price." Pet. App. 39a. (quotation marks omitted)

That ruling contravenes *Palazzolo* by establishing a threshold burden of proof that the plaintiff incurred incremental investment costs in purchasing regulated property. But under *Palazzolo*, the "lack of a personal financial investment by a post-enactment acquirer of property" will not defeat a *Penn Central* takings claim. *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

The majority's summary judgment ruling also ignored record evidence that the Guggenheims' purchase price was influenced by an expectation that this constitutionally suspect law would terminate. As the dissent noted:

> Having determined that they might be able to free their mobilehome park from the Ordinance, the Guggenheims bought the land based on these investment-backed

> expectations – expectations which influenced the price they were willing to pay for the property as well as their expected rate of return on the investment.

Pet. App. 39a.

The Guggenheims' reasonable investment-backed expectation that they could enjoy the benefits of land ownership without the interference of the Goleta rent control law should have been a factor that weighed in favor of finding a regulatory taking under *Penn Central*. In concluding otherwise, the majority cast aside this Court's decision in *Palazzolo* and improperly applied the investment-backed expectation factor.

II. The Majority Opinion Is Inconsistent With *Penn Central* Because It Focuses Exclusively On One Factor.

Although the majority below acknowledged that *Penn Central* analysis requires a court to consider several factors to determine whether a regulatory taking has occurred, its discussion began and ended with the review of just one of those factors — "the extent to which the regulation has interfered with distinct investment-backed expectations." Pet. App. 18a (quotation marks omitted). Thus, even if the court's analysis of that factor were correct, which it was not, the decision would still be erroneous and warrant review.

The Ninth Circuit's decision is directly at odds with this Court's ruling in *Lingle* that "*several* factors have particular significance":

> Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' In addition, the 'character of the governmental action' — for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good' — may be relevant in discerning whether a taking has occurred.

Lingle, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124). In determining the character of the regulation, the Court should further consider (1) whether the regulation is "reasonably necessary to the effectuation of a substantial public purpose," *Penn Central*, 438 U.S. at 127 (quotation marks omitted); (2) the allocation of the burden among all taxpayers and whether a landowner has been "singled out," *Lingle*, 544 U.S. at 543; *Penn Central*, 438 U.S. at 127 (considering whether the regulation "has an unduly harsh impact upon the owner's use of the property"); and (3) whether the effect of the regulation is functionally similar to a physical taking. *Lingle*, 544 U.S. at 539.

Judge Bea's dissent below recognized that *Penn Central* requires "a three-factor balancing test," not a "one-strike-you're-out' checklist." Pet. App. at 28a. "No one factor is 'talismanic;' Justice O'Connor so recognized in *Palazzolo* when she criticized the state supreme court for "elevating what it believed to be

'[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive status.'" *Id.* (internal citations omitted); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002) ("[W]e have eschewed 'any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . The outcome instead 'depends largely' upon the particular circumstances [in the] case.") (internal citations omitted; second bracket in original).

It was fundamental error for the majority opinion not to consider all of the *Penn Central* factors. That failure was not harmless.

A. The Goleta Ordinance Has A Severe Economic Impact On The Value Of The Guggenheims' Property.

If the majority opinion had looked at the economic impact of the rent control law, as *Penn Central* and *Lingle* require, it would have found sufficient evidence to warrant a trial on the merits. The Goleta ordinance transferred 80% of the value of the Guggenheims' land by forcing the Guggenheims to rent their land at only 20% of its market value. Pet. App. 31a n.5. That value was transferred to an arbitrary group of private tenants who were able to sell their homes at premiums that were over 700% of the value of the home. *Id.* Mobilehomes worth $12,000 would sell for $100,000, with incoming tenants overpaying by $88,000. *Id.* This increased

cost to the public also represented a windfall to existing residents and a transfer of over 80% of the value of the Guggenheims' land to those existing residents.

The majority below did not dispute this evidence of economic impact and admitted that the value of the Guggenheims' property has been driven down by Goleta's rent control law. Pet. App. 18a. But the court decided that the fact the Guggenheims are forced to bear this burden is inconsequential. *Id.*

B. The Character Of The Goleta Ordinance Provides Grounds For Finding A Regulatory Taking.

The character of the government action at issue here also strongly militated in favor of finding a taking and provides further grounds why the taking claim should not have been resolved in favor of the City as a matter of law. Although the character of a regulation is central to determining whether a regulatory taking has in fact occurred under *Penn Central*, the majority completely ignored that factor.

To determine the character of the regulation, courts look to "balance the liberty interest of the private property owner against the Government's need to protect the public interest through imposition of the restraint." *Cienega Gardens v. United States*, 331 F.3d 1319, 1338 (Fed. Cir. 2003) (quotation marks omitted). Under the *Penn Central* takings analysis, the burden that a regulation imposes on a property must be balanced against whether that burden is reasonably necessary to achieve a public purpose, in order to determine both

if the regulation "goes too far" and whether the burden in fairness should be borne by the government. *Penn Central*, 438 U.S. at 127.[3]

The Court in *Lingle* noted that the *Penn Central* analysis focuses not only on "*the burden* a particular regulation imposes upon private property rights," but also on how that "regulatory burden is *distributed* among property owners." *Lingle*, 125 S. Ct. at 2084 (emphasis in original); *see also Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) ("If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the state's action, even if otherwise valid, might violate . . . the Takings Clause. . . ."). Laws that disproportionately and significantly burden only certain landowners will generally constitute a regulatory taking unless the burden on a select few was "reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." *Penn Central*,

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[3] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("[T]he statute does not disclose a public interest sufficient to warrant so extensive a destruction of [property rights]."); *Keystone Bituminous Coal Association v. De Benedictis*, 480 U.S. 470, 488 (1987) ("[T]he nature of the [s]tate's interest in the regulation is a critical factor in determining whether a taking has occurred. . . ."); *see also Yee*, 503 U.S. at 529-30 (the fact that, under a mobilehome rent control ordinance, wealth was transferred only to "incumbent mobile home owner . . .might have some bearing on . . . whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance") (emphasis in original).

438 U.S. at 134 n.30. Additionally, the creation of a massive premium in the sale prices of mobilehomes is relevant to the character of government action because it bears on whether there is a "sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee v. City of Escondido,* 503 U.S. 519, 530 (1992).

Had the Ninth Circuit majority considered the evidence, it would have found ample evidence to permit a reasonable trier-of-fact to find that the Goleta rent control regulation places an undue and singular burden on the Guggenheims and that it lacks a reasonable relationship to a public purpose. Substantial evidence submitted by the Guggenheims in opposition to summary judgment established that the Goleta rent regulation creates a premium and effects a wealth transfer from property owners to tenants, depriving property owners of basic property rights without serving its stated purposes of protecting against unreasonable rents. "The designed structure and working of the ordinance amounts to nothing more than a wealth transfer from the landowner to the original tenant, and indisputably does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home."[4] Pet. App. 44a.

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[4] The majority contended that the Goleta law "protects owners of mobile homes from the leverage owners of the pads have, to collect a premium reflecting the cost of moving the mobile home on top of the market value of use of the land." Pet. App. 24a. The dissent correctly uncovered the flaws in the majority's argument. *Id.* at 51a-52a. The costs of moving a mobile home are no different whether the home is being transferred from a

For these reasons, the character of the Goleta regulation militates strongly in favor of finding a *Penn Central* taking. Nonetheless, the Ninth Circuit majority made no more than a passing reference to this important *Penn Central* factor. *See* Pet. App. 18a ("*Lingle* points out that the character of the government action may also be relevant, but this cuts against the Guggenheims because the government action here is a continuation of an old ordinance") (footnote omitted).

This Court should grant certiorari and confirm that the Ninth Circuit has fundamentally misstated the governing constitutional principles for determining whether a regulatory taking has occurred.

CONCLUSION

The Ninth Circuit's *en banc* decision in *Guggenheim* creates unfounded constitutional rules that depart dramatically from the decisions of this Court and should not be permitted to stand.

The Petition for a Writ of Certiorari should be granted.

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rent controlled park or a market controlled one. In addition, the hundreds of thousands of dollars that are transferred to a single home owner by virtue of the Goleta rent control law cannot be justified by potential "costs of moving." Under any scenario, those costs are a small fraction (typically $10,000 or less) of the premiums generated and transferred to tenants under Goleta's rent control ordinance.

Respectfully Submitted,

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186

12

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In The
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, and MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF MANUFACTURED HOUSING INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that "post-enactment purchasers cannot challenge a regulation under the Takings Clause." *Id.* at 626. In this case, a divided *en banc* panel of the Ninth Circuit distinguished *Palazzolo* on the basis that the plaintiff there had acquired the property by operation of law (instead of purchasing it) and held that the fact the petitioners there had purchased the property subject to the challenged regulation was "fatal to [petitioners'] claim."

Is the purchaser of property subject to a regulatory restriction foreclosed from challenging the restriction as a violation of the Takings Clause?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE NINTH CIRCUIT ADDED TO THE DIVIDE IN THE LOWER COURTS ON HOW (OR WHETHER) TO APPLY *PALAZZOLO*'S REJECTION OF THE "NOTICE" RULE 6

A. Preexisting Regulations As Background Principles 6

B. "Notice" As Limiting Investment-Backed Expectations 11

II. THE RIGHT TO MAKE REASONABLE USE OF PROPERTY IS A PERSONAL RIGHT 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Ala. Dep't of Transp. v. Land Energy, Ltd., 886 So.2d 787 (Ala. 2004) 17

Andrus v. Allard, 444 U.S. 51 (1979) 7

Appolo Fuels, Inc. v. United States, 381 F.3d 1338 (Fed. Cir. 2004) 12

Armstrong v. United States, 364 U.S. 40 (1960) 21

Bd. of Supervisors of Culpeper County v. Greengael, L.L.C., 626 S.E.2d 357 (Va. 2006) 17

Callan v. City of Laguna Beach, No. G029020, 2003 WL 204734 (Cal. Ct. App. Jan. 30, 2003), *rev'd on other grounds*, 2003 WL 22026702 (Cal. Ct. App. Aug. 29, 2003) 18

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 11

Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994) 15

CRV Enters. v. United States, 86 Fed. Cl. 758 (2009) 8

CRV Enters. v. United States, 626 F.3d 1241 (Fed. Cir. 2010) 9, 10

Danforth v. United States, 308 U.S. 271 (1939) 23

East First Street, L.L.C. v. Bd. of Adjustments, No. 2007 CA 0664, 2008 WL 2567080 (La. Ct. App. June 6, 2008) 18

TABLE OF AUTHORITIES – Continued

Page

FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 673 N.E.2d 61 (Mass. Ct. App. 1996) 15

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 7, 21

Forest Props., Inc. v. United States, 39 Fed. Cl. 56 (1997) 15

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 11

Hodel v. Irving, 481 U.S. 704 (1987) 13, 22

K & K Const., Inc. v. Dep't of Envtl. Quality, 705 N.W.2d 365 (Mich. Ct. App. 2005) 16

KCI Management, Inc. v. Bd. of Appeal of Boston, 764 N.E.2d 377 (Mass. App. Ct. 2002) 19

LaSalle Nat'l Bank v. City of Highland Park, 799 N.E.2d 781 (Ill. Ct. App. 2003) 16

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 3, 4, 7, 8, 12

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 8

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 8, 9

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 21

Manor v. Reisma, No. C.A. PC89-2447, 2003 WL 1224248 (R.I. Feb. 24, 2003) 19

TABLE OF AUTHORITIES – Continued

Page

Manufactured Home Communities, Inc. v. County of San Luis Obispo, 84 Cal. Rptr. 3d 367 (Cal. Ct. App. 2008) 1

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 8, 22, 23

Norman v. United States, 429 F.3d 1081 (Fed. Cir. 2005) 12

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) ..... *passim*

Penn Central Trans. Co. v. City of New York, 438 U.S. 104 (1978) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 6, 7

Prakash v. Copley Twp. Trs., No. 21057, 2003 WL 294365 (Ohio Ct. App. Feb. 12, 2003) 20

Prosser v. Kennedy Enters., Inc., 179 P.3d 1178 (Mont. 2008) 17

Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County, 793 A.2d 545 (Md. 2002) 19

Rukab v. City of Jacksonville Beach, 811 So.2d 727 (Fla. Dist. Ct. App. 2002) 18

Sagarin v. City of Bloomington, 932 N.E.2d 739 (Ind. Ct. App. 2010) 15

Sanderson v. Town of Candia, 787 A.2d 167 (N.H. 2001) 17

Schooner Harbor Ventures, Inc. v. United States, 569 F.3d 1359 (Fed. Cir. 2009) 10

TABLE OF AUTHORITIES – Continued

Page

Sprint Communications Co. v. APCC Services, Inc., 554 U.S. 269 (2008) 22

State ex rel. *Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 875 N.E.2d 59 (Ohio 2007) 19

State ex rel. *Shemo v. Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002) 20

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 3

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007) 15, 17

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 15

CONSTITUTIONS AND STATUTES

U.S. Const. amend. V ..... *passim*

Assignment of Claims Act, 31 U.S.C. § 3727(b) 9

OTHER AUTHORITIES

John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171 (2005) 20

IDENTITY AND INTEREST OF AMICUS CURIAE

The Manufactured Housing Institute (MHI) is a national trade association representing all segments of the manufactured housing industry including manufacturers, lenders, community owners, and retailers.[1] MHI is interested in protecting the constitutional rights of property owners, including the Fifth Amendment rights of mobile home park owners like Petitioners. *Cf. Manufactured Home Communities, Inc. v. County of San Luis Obispo*, 84 Cal. Rptr. 3d 367, 370 (Cal. Ct. App. 2008) ("The Constitution protects everyone, the poor, the wealthy, the weak, the powerful, the guilty and the innocent. . . . Here we add to our list, mobilehome park owners.").

MHI participated as amicus curiae in the court below. In this brief, MHI seeks to provide the Court with an additional viewpoint on the issues, and to urge the Court to grant the petition for certiorari and either reverse, or schedule the case for full briefing and argument.

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[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A property owner's right to make reasonable use of her land does not evaporate simply because restrictive regulations predate her acquisition. Purchasers of property subject to restrictive regulations maintain all of the rights protected by the Fifth Amendment and may assert a takings claim.

In *Palazzolo*, this Court confirmed these principles, and recognized that regulations do not become part of a parcel's "background principles" simply because the property is transferred to a new owner. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In that case, the Court rejected the so-called "notice rule," the assertion that a property owner is "deemed to have notice of an earlier-enacted restriction . . . and is barred from claiming that it effects a taking." *Id.* at 626. Such a rule would allow the state "to put an expiration date on the Takings Clause." *Id.* at 627. The Ninth Circuit majority, however, treated that holding as a mere "rhetorical flourish,"[2] concluding

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[2] *See Guggenheim v. City of Goleta*, No. 06-56306, Video of Oral Argument, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (June 22, 2010), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_vid=0000005941:

> JUDGE KLEINFELD: I just don't see where *Palazzolo* helps you much. I mean that was a 100% shareholder in a corporation that owned real estate. He didn't maintain his corporate status properly, with the fees, annual filings, the statements in the records whatever it was, so the corporation automatically became defunct, and the 100% shareholder now became the holder of title to the real estate instead of the

(Continued on following page)

the fact that the Guggenheims purchased their property after the county's rent control regime became effective was "fatal" to their regulatory takings claim. Pet. App. 18a.

More than thirty years ago in *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978), this Court established a three-factor framework for analyzing most regulatory takings claims, and this standard has been recently reaffirmed as the "default" test. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005). *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)

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corporation in which he held 100% of the shares. The Government said well gee, the taking was from somebody else, he can't recover, and the Supreme Court said yes he can. And in that circumstance, the economic value was taken from him either way. And it was well within the statute of limitations.

MR. COLDREN: Except Judge Kleinfeld, that the *Palazzolo* court uses that as an occasion to talk about how there's no expiration date on the Constitution. To talk about how we're not going to stick such a Hobbesian stick . . .

JUDGE KLEINFELD: We all enjoy using those rhetorical flourishes in opinions, but we still have to look at the facts and the holding.

MR. COLDREN: Yes, and the facts of *Palazzolo* and the holding of *Palazzolo* is that future generations also have the right to rely upon the constitutional protections.

("Our polestar . . . remains the principles set forth in *Penn Central* itself," which require a "careful examination and weighing of all the relevant circumstances[.]")). These circumstances include consideration of "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations[, and] the character of the governmental action[.]" *Penn Central*, 438 U.S. at 124 (cited in *Lingle*, 544 U.S. at 538-39).

Because this framework eschews any "set formula" and relies instead on "essentially ad hoc, factual inquiries," it is, by its very nature, incapable of being subject to the rigid per se "notice" rule rejected by this Court in *Palazzolo*, but revived by the Ninth Circuit *en banc* majority. The decision below ignored the requirement of a "weighing of all the relevant circumstances," and under the "fatal" notice rule, when a buyer purchases property subject to restrictive regulation, the remaining two *Penn Central* factors become irrelevant. The Ninth Circuit's rejection of *Palazzolo* is apparently based on nothing more than caprice, since it offered no analysis or rationale in support, but instead established a bright-line rule focused solely on the court's misperception of the Guggenheims' investment-backed expectations. It assumed, without any evidence to support it, that the cost of Goleta's rent control ordinance was factored into the purchase price. *See* Pet. App. 18a ("Since the ordinance was a matter of public record, the price they paid for the mobile home park

doubtless reflected the burden of rent control they would have to suffer.").

Yet, the Ninth Circuit's decision – as inexplicable as it is in light of this Court's rejection of the notice rule in *Palazzolo* – is not terribly surprising, given the difficulty the lower courts have had in applying *Palazzolo*'s clear holding. The Ninth Circuit is not the only court that is unable – or unwilling – to correctly follow *Palazzolo*. Lacking this Court's guidance, the default regulatory takings test has become a standardless exercise in judicial intuition, hidden behind a gloss of objectivity and faulty economic assumptions.

This brief addresses two issues. *First*, it details the varying approaches the lower courts have taken in applying *Palazzolo*'s rejection of the notice rule. Some courts, like the Ninth Circuit, simply ignore it. Others view preexisting regulations as a limit on an owner's "property," while others apply it as just one factor in the *Penn Central* analysis. This Court should grant the petition to resolve the differences. *Second*, this brief highlights the Ninth Circuit's erroneous assumption that it is the prior owner's rights which are at issue in this case, and not the Guggenheims' right to make reasonable use of their property which were infringed upon by the city's regulations.

ARGUMENT

I. THE NINTH CIRCUIT ADDED TO THE DIVIDE IN THE LOWER COURTS ON HOW (OR WHETHER) TO APPLY *PALAZZOLO*'S REJECTION OF THE "NOTICE" RULE

The Ninth Circuit joined the growing list of courts that have revived some variant of the notice rule, holding that a preexisting regulation cuts off a property owner's ability to raise a takings claim.

Some courts, like the Ninth Circuit, view preexisting regulations as "fatal" to a property owner's takings claim. Pet. App. 18a. Other courts misapply *Palazzolo* in a different way but reach similar results, concluding that preexisting regulations are part of the property's "background principles," thus diminishing a purchaser's title and implicitly holding that the post-regulation purchaser owns less "property" than her predecessor. Other courts adhere to *Palazzolo*, concluding that "notice" is either entirely irrelevant or merely one factor to be considered.

A. Preexisting Regulations As Background Principles

According to the "storied but cryptic formulation" in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), while property may be regulated to a certain extent, "'if regulation goes too far it will be

recognized as a taking.'" *Lingle*, 544 U.S. at 537 (quoting *Mahon*, 260 U.S. at 415). In other words, government's power to enact regulations affecting private property operates on a continuum, and when it crosses an equitable boundary determined in most cases by reference to a multitude of case-specific facts, the label attached to the exercise of power is irrelevant, and what matters is the impact of the regulation on the owner.[3] "The rub, of course, has been – and remains – how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 538.

In some cases, it is easy. This Court has established two categories of regulations that are *per se* takings. First, "where government requires an owner to suffer a permanent physical invasion of

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[3] *See Mahon*, 260 U.S. at 415 (Kohler Act enacted pursuant to state's police power went "too far"); *Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) (federal power to protect endangered species measured against Takings Clause; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); *Lingle*, 544 U.S. at 537 (This Court "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such 'regulatory takings' may be compensable under the Fifth Amendment.").

her property – however minor – it must provide just compensation." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (law requiring property owners to allow installation of a small cable box on buildings was a taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (agency required landowner to dedicate public easement as a condition of development approvals). Second, a *per se* taking also occurs when a regulation deprives an owner of "'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis omitted)). In *Lucas*, this Court noted an exception to the *per se* rules:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas, 505 U.S. at 1029.

After *Lucas*, some courts treated pre-acquisition regulations as part of the "background principles" inherent in title. Under this theory, a post-regulation purchaser does not possess Constitutionally-recognized "property," and thus cannot assert a takings claim. *See, e.g.*, *CRV Enters. v. United States*, 86 Fed. Cl. 758, 770 (2009) (plaintiff did not own the property at the time of the taking and thus did not have a "valid property interest" entitling it to compensation), *aff'd*,

626 F.3d 1241 (Fed. Cir. 2010), *petition for cert. filed* No. 10-1151 (Mar. 17, 2011).

The most recent example is the Federal Circuit's decision in *CRV Enters., Inc. v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), a case in which the court concluded a property owner could not assert a takings claim since it did not own the property at the time of the alleged taking. *Id.* at 1250. In that case, the owner of a riparian parcel asserted that the agency's installation of a log boom in a waterway adjacent to its parcel cut off its riparian access and was a taking. The court first rejected the claim that the installation of the log boom was a physical taking. *Id.* at 1246. The court next concluded that the regulatory taking did not take place at the time the agency installed the log boom, but must have been brought years before when it *decided* to install it. *Id.* at 1248-49. Because CRV had not yet acquired the property at that time, the Federal Circuit – like the Ninth Circuit in the case at bar – simply halted its analysis and affirmed the dismissal of CRV's takings claim. The court concluded that a takings claim "if it existed, was owned by the prior owner." *Id.* at 1250.[4] The court held that "plaintiffs did not own

[4] The Federal Circuit also rejected the argument that the prior owner, by "assign[ing] his rights to CRV" had also transferred his takings claim, concluding that such transfer would violate the Assignment of Claims Act, 31 U.S.C. § 3727(b), and would be ineffective. *See CRV*, 626 F.3d at 1249 n.7.

the property at the time of the alleged regulatory taking and therefore lacked standing." *Id.* at 1249.

Even though the Federal Circuit couched its analysis in terms of "standing" and not on *Lucas* background principles, its decision that the post-regulation transfer of property barred the takings claim was plainly grounded in the idea that the plaintiff did not possess "property" protected by the Fifth Amendment from uncompensated *de facto* acquisition.[5]

But unlike the Ninth Circuit, the Federal Circuit has in other cases selectively applied *Palazzolo*'s plain meaning, which highlights inconsistent and uneven approaches to the issue. For example, in *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), the court applied the *Palazzolo* rule faithfully. The court concluded that a preexisting regulation was not a categorical bar to a takings claim, but "is a factor that may be considered, depending on the circumstances," and that this Court in *Palazzolo* "reject[ed] the argument that one who acquires title after the relevant regulation was enacted could never bring a takings claim." *Id.* at 1366. "Background principles," not "pre-existing regulations" are the relevant factor against which the regulation is judged, and while a widely accepted history of regulatory infringement on an owner's

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[5] The property owner's petition for certiorari in *CRV* is also pending before this Court, and amicus respectfully suggests that these petitions should be considered together.

freedom to do what she wishes with her property may over time develop into a "background principle," the challenged regulation is not a contributor to the analysis.

B. "Notice" As Limiting Investment-Backed Expectations

A second approach to analyzing the effect of preexisting regulation involves regulatory takings challenges outside of the two "relatively narrow" classes of physical invasions and economic wipeouts, which are analyzed by the three-part *Penn Central* standard. In that case, this Court "acknowledged that it had hitherto been unable to develop any set formula for evaluating regulatory takings claims, but identified several factors that have particular significance." *Penn Central*, 438 U.S. at 124. Those factors include: (1) the "economic impact" of the government action or regulation; (2) how this action "interfere[s] with distinct investment-backed expectations;" and (3) the "character" of the regulation or government action. *Id.* (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)). The *Penn Central* inquiry is inherently fact-based, and "depends largely upon the particular circumstances [in each] case." *Id.* Questions of economic viability, the property owner's expectations, and diminution of use and value are factual inquiries. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [and that] question is for the jury.").

Like the Ninth Circuit, some courts view regulations which predate acquisition as destroying investment-backed expectations, obviating the need to consider the economic impact of the regulation, or the character of the government action. These courts transform the investment-backed expectations factor into the dispositive consideration. Despite the Court's recent caution that no *Penn Central* factor is entitled to conclusive weight, *Lingle*, 544 U.S. at 539-40, the Ninth Circuit asserted that Goleta's rent control ordinance was not a taking only because the Guggenheims purchased their mobile home park after the county's ordinance was in place, and the court needed to look no further. For example, the Federal Circuit has recognized *Palazzolo*'s rejection of a *per se* bar on post-regulation takings claims, but has created an end-run around the holding by considering notice as dispositive in the investment-backed expectations inquiry. *See Norman v. United States*, 429 F.3d 1081, 1092-94 (Fed. Cir. 2005) (noting the *Palazzolo* rule that a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction," but finding no reasonable investment-backed expectations where plaintiff had actual and constructive knowledge of wetlands restrictions); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (recognizing *Palazzolo*, but concluding "that Appolo's reasonable investment-backed expectations are shaped by the regulatory regime in place as of the date it purchased the leases at issue.").

Even assuming that preexisting regulations had some impact on a property owner's investment-backed expectations, it was plainly wrong for the Ninth Circuit to stop its *Penn Central* analysis there, and not consider the devastating economic impact of Goleta's rent control regulation on the Guggenheims, or the character of the government action (a naked wealth transfer, with only narrow classes of citizens being benefitted and burdened). For example, in *Hodel v. Irving*, 481 U.S. 704 (1987), this Court found that the plaintiffs – heirs who stood to inherit extremely small fractional interests in Indian land – had "dubious" investment-backed expectations when challenging a federal statute that escheated their decedents' interests to their tribes, and virtually destroyed the right to pass on property to heirs. *Id.* at 715 ("The extent to which any of appellees' decedents had 'investment-backed expectations' in passing on the property is dubious. Though it is conceivable that some of these interests were purchased with the expectation that the owners might pass on the remainder to their heirs at death, the property has been held in trust for the Indians for 100 years and is overwhelmingly acquired by gift, descent, or devise."). The Court also held that the economic impact on the plaintiffs was minimal. *Id.* However, the Court found a taking by applying the third *Penn Central* factor:

> If we were to stop our analysis at this point, we might well find § 207 constitutional. But the character of the Government regulation

> here is extraordinary. . . . Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property – the small undivided interest – to one's heirs. In one form or another, the right to pass on property – to one's family in particular – has been part of the Anglo American legal system since feudal times.

Id. at 716-17 (citations omitted).

Instead of basing their conclusions on a balancing of all three of the *Penn Central* factors in light of the factual record, the Ninth Circuit and many of the other courts that follow its reasoning substitute a supposition that the offending regulation must have resulted in a low purchase price for the property owner:

> One reason why these distinctions matter is that even though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation.

Pet. App. 15a. Like the Ninth Circuit, other courts reach similar conclusions, based only on their naked assertions (never supported by the factual record) that "the owner presumably paid a discounted price

for the property. Compensating him for a 'taking' would confer a windfall." *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) *quoted in Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 77 (1997) ("[I]t is assumed that when a property owner purchases property that is subject to regulations which may proscribe, or limit certain uses of the property, 'the owner presumably paid a discounted price for the property. Compensating him for a "taking" would confer a windfall.'"). *See also Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 638 (Minn. 2007) (concluding the investment-backed expectations factor weighed against post-enactment purchaser in part because "the purchase price reflected the significant restrictions imposed on the use of the property."); *Sagarin v. City of Bloomington*, 932 N.E.2d 739, 744 (Ind. Ct. App. 2010) ("Sagarin's purchase of the property with the knowledge of the easement defeats any possible economic injury because that circumstance was an implicit consideration in the price negotiation of the home. Therefore, he has no basis for an inverse condemnation claim."); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 673 N.E.2d 61, 70 (Mass. Ct. App. 1996) ("When FIC purchased the property in 1992, the Blackstone wetlands by-law was already in effect. . . . The price FIC paid for the entire thirty-eight-lot parcel should have reflected the limitations imposed by the wetlands by-law.").

State courts, which after *Williamson County Regional Planning Comm'n v. Hamilton Bank of*

Johnson City, 473 U.S. 172 (1985) consider the vast majority of federal Fifth Amendment takings claims, have not fared much better in applying *Palazzolo* consistently or uniformly. For example, some state courts pay lip service to *Palazzolo*'s rejection of the notice rule, but apply it anyway:

• In *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 789 (Ill. Ct. App. 2003), the Illinois Court of Appeals acknowledged *Palazzolo*, but interpreted this Court's admonition against post-enactment bars to takings claims as requiring only that "such knowledge [is] not, *ipso facto*, an absolute bar." The Illinois court held that "while knowledge of a regulation at the time of ownership is not an absolute bar to a zoning challenge, it is proper to consider that the zoning restriction existed at the time of the plaintiff's acquisition in determining whether the plaintiff's investment-backed expectations have been met." *Id.* Based in part on the fact that the restriction pre-dated the plaintiff's ownership, and Illinois case law pre-dating *Palazzolo*, the Illinois court concluded that no taking had occurred. *Id.*

• In *K & K Const., Inc. v. Dep't of Envtl. Quality*, 705 N.W.2d 365, 382 (Mich. Ct. App. 2005), the court referenced *Palazzolo*, but found no taking because, "equity is no better served by ignoring a claimant's knowledge of existing land-use regulations than it would be by holding that the claimant's knowledge of those regulations absolutely barred recovery regardless of how inequitable those regulations might be."

- In *Prosser v. Kennedy Enters., Inc.*, 179 P.3d 1178, 1182 (Mont. 2008), the court noted in dicta in a non-inverse condemnation case that if applied, the *Palazzolo* rule would be subject to Montana precedent that "a party cannot complain regarding alleged diminution in value caused by a government action when she purchased the property after the government action."

- In *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007), the court found that investment-backed expectations for a post-enactment purchaser favored the city.

- In *Sanderson v. Town of Candia*, 787 A.2d 167, 169 (N.H. 2001), the court concluded that "the plaintiff purchased the property knowing both of the ordinance's frontage requirements and that the property lacked the required frontage. Thus, she purchased the hardship of which she now complains."

Other state courts remain faithful to *Palazzolo*'s teachings:

- In *Bd. of Supervisors of Culpeper County v. Greengael, L.L.C.*, 626 S.E.2d 357, 369 (Va. 2006), the court held that "[t]hough the regulations Greengael challenges were in effect when it acquired the property, this fact does not per se preclude Greengael from raising a regulatory taking claim." *Id.* at 369 (internal citation and footnote omitted).

- In *Ala. Dep't of Transp. v. Land Energy, Ltd.*, 886 So.2d 787, 798-99 (Ala. 2004), the Alabama

Supreme Court affirmed a lower court decision that a regulatory taking had occurred due to interference with investment-backed expectations even where the owner acknowledged that at the time of purchase it did not own surface rights and knew it would have to obtain consent of surface owner to conduct surface mining.

- In *Callan v. City of Laguna Beach*, No. G029020, 2003 WL 204734, *4 (Cal. Ct. App. Jan. 30, 2003), *rev'd on other grounds*, 2003 WL 22026702 (Cal. Ct. App. Aug. 29, 2003) the court rejected the city's argument that "even pretending that the City's 1974 adoption of the minimum lot size ordinances constituted a 'taking' of the property, Plaintiffs purchased the property subject to the 'taking' and are forever precluded from any legal challenge based upon inverse condemnation," and reiterating that "postenactment purchase does not bar the Callans's suit[.]"

- In *Rukab v. City of Jacksonville Beach*, 811 So.2d 727, 733 (Fla. Dist. Ct. App. 2002), the court relied upon *Palazzolo* to find that there is "no legal support for the contention that the Rukabs are somehow precluded from asserting their constitutional rights within the eminent domain proceeding because they bought the property subject to the previous determination of blight."

- In *East First Street, L.L.C. v. Bd. of Adjustments*, No. 2007 CA 0664, 2008 WL 2567080, at *3-4 (La. Ct. App. June 6, 2008), the court recognized the

lower court's "erroneous belief" "that the Applicant's takings claims were barred by their acquisition of the subject properties after enactment of the zoning regulations," thus, "the district court erred to the extent it found that the Applicants created for themselves the hardship caused by the zoning restriction."

• In *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 793 A.2d 545, 555-61 (Md. 2002), the court held that the landowner's purchase of the property, with notice that the property was subject to area restrictions, including a critical area buffer zone for wetlands and county zoning provisions, was not a self-created hardship that precluded the landowner from receiving an area variance.

• In *KCI Management, Inc. v. Bd. of Appeal of Boston*, 764 N.E.2d 377, 380 (Mass. App. Ct. 2002), the court held that a challenge to regulation was timely, and concluded "[w]e see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provisions first affected it."

• In *Manor v. Reisma*, No. C.A. PC89-2447, 2003 WL 1224248, *7 (R.I. Feb. 24, 2003), the court found a compensable taking and standing pursuant to *Palazzolo* where a claim for inverse condemnation had been assigned to the plaintiff who acquired property after effective date of regulation.

• In *State* ex rel. *Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 875 N.E.2d 59, 67-68 (Ohio 2007), the court held that notice is relevant, but

absent a *Penn Central* claim, *Palazzolo* does not apply.

• In *Prakash v. Copley Twp. Trs.*, No. 21057, 2003 WL 294365, *3 (Ohio Ct. App. Feb. 12, 2003), the court held that evidence of prior notice of a regulation was inadmissible at trial under *Palazzolo*.

• In *State* ex rel. *Shemo v. Mayfield Heights*, 765 N.E.2d 345, 352 (Ohio 2002), the court rejected the government's "notice" argument.

The lower courts' varying approaches to the scope of *Palazzolo*'s rejection of the notice rule reflect that this Court's intervention is needed. *Penn Central*'s factors have been the subject of academic criticism and a call for clarification:

> If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intuition, it is imperative to clarify the meaning of *Penn Central*.

John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 174-75 (2005). Yet, "intuition" and voodoo economics, not the rule of law appear to be what guided the Ninth Circuit to come up with its arbitrary "fatal" rule. Since *Penn Central* indeed appears to be "here to stay," the petition in the case at bar presents the opportunity to clarify that "set formulas" such as those imposed by the Ninth Circuit in this case and in the other lower courts which have found ways around *Palazzolo* should not be permitted.

II. THE RIGHT TO MAKE REASONABLE USE OF PROPERTY IS A PERSONAL RIGHT

The right to make reasonable use of property is a fundamental constitutional right:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). Thus, a takings claim is, in essence, an owner's challenge to the state's ability to restrict *her* rights to make reasonable use of her property through its police power when "in all fairness and justice" the burdens the regulations concentrated solely on her "should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987) ("[t]he entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without [institution of eminent domain] proceedings").

The Ninth Circuit's fundamental flaw was its treatment of a property owner's takings claim as something other than a personal right. Instead, the Ninth Circuit treated the right as one that inures to the property, and not its owner. However, it is the

Guggenheims' rights to make use of their property – not their predecessor-in-title's – that is at issue in this case. Even if the takings claim here was only the prior owner's, the Ninth Circuit wrongly assumed it could not be transferred to the Guggenheims. *See, e.g.*, *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 275 (2008) ("And we have discovered that history and precedent are clear on the question before us: Assignees of a claim, including assignees for collection, have long been permitted to bring suit."). This Court has repeatedly held that the right to own property and the right to make reasonable use of it free of unconstitutional interference may be passed to future owners. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court confirmed that the ability to transfer property by will – in that case, the ability to devise fractional interests in Indian land – was itself a property right that could not be taken without compensation. *Id.* at 718. *See also Palazzolo*, 533 U.S. at 627 ("The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself."). The Ninth Circuit's decision failed to recognize that *inter vivos* transfers are similarly protected.

Additionally, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) undercuts the Ninth Circuit *en banc* majority's attempt to distinguish *Palazzolo* on the basis that in that case, the owner

took title from his closely-held corporation, while the Guggenheims purchased their property in an arm's-length transaction. In *Nollan*, lessors of property with an option to buy sought a permit to build a home from the Coastal Commission, which granted the permit conditioned upon the lessors agreeing to dedicate a public easement across the land to allow the public to access the beach. *Id.* at 827-28. The trial court invalidated the condition, and while the case was on appeal, the lessors exercised their option and purchased the land. *Id.* at 830-31. Even though the exaction was imposed by the Commission when the Nollans were lessors and had not yet owned the property, this Court explained "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* at 833 n.2.

Four years later in *Palazzolo*, this Court concluded that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Palazzolo*, 533 U.S. at 627. Palazzolo's claim was "not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630. The Court characterized the rule "that any award goes to the owner at the time of the taking" and "is not passed to a subsequent purchaser" as applying "[i]n a direct condemnation action, or when a State has physically invaded the property," where "the fact and extent of the taking are known." *Id.* at 628 (citing *Danforth v. United States*,

308 U.S. 271, 284 (1939)). In the case at bar, the Guggenheims' predecessor in title could not have sued the City of Goleta for its restrictions on his right to make use of his property because the City of Goleta did not exist until after the Guggenheims purchased it. *Cf. Palazzolo*, 533 U.S. at 628 (describing situation "where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner").

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests the Court grant the Petition for Writ of Certiorari.

APRIL 2011.

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In the
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL APARTMENT ASSOCIATION, NATIONAL MULTI HOUSING COUNCIL, SAN DIEGO COUNTY APARTMENT ASSOCIATION, APARTMENT ASSOCIATION, CALIFORNIA SOUTHERN CITIES, APARTMENT ASSOCIATION OF ORANGE COUNTY, APARTMENT AND OFFICE BUILDING ASSOCIATION OF METROPOLITAN WASHINGTON IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF *AMICI* 1
SUMMARY OF ARGUMENT 3
ARGUMENT 4
I. The Ninth Circuit's holding conflicts with the Court's decision in *Palazzolo*, which expressly found that parties who purchase property after the enactment of restrictive regulations are not barred from asserting a takings claim based on those regulations. 4
II. Rent controls have historically been viewed as temporary measures enacted and revised in response to extraordinary housing market conditions. 13
III. The Ninth Circuit's Static Analysis of a Fluid Real Estate Market Results in a Legal Fiction 17

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009) *rev'd en banc*, 2010 WL 5174984 (9th Cir. Dec. 22, 2010) 4, 6, 20

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 13

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 5

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 5

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 10

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) ..... *passim*

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1977) ..... *passim*

Yee v. City of Escondido, 503 U.S. 519 (1992) 6, 12, 13

FEDERAL STATUTES

Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. Appx. §§ 901 *et seq* 14

Federal Housing and Rent Act of 1947 14

STATE STATUTES

D.C. Official Code § 42-3509.07 16

D.C. Law 6-10 16

Emergency Housing Rent Control Law of 1946 16
Emergency Tenant Protection Act of 1974 16
Rent Regulation Reform Act of 1997 15
CONSTITUTIONAL PROVISIONS
Fifth Amendment of the Constitution 3
OTHER AUTHORITIES
Downs, *A Reevaluation of Residential Rent Controls*, 1996 ..... 13, 15
REIS, Inc. Santa Barbara Apartment 4th Quarter 2010 Performance Monitor 18
Southern California Multifamily 2010 Report 19

INTEREST OF *AMICI*[1]

The National Apartment Association ("NAA") is the leading national advocate for quality rental housing. NAA is a federation of 170 state and local affiliated associations, representing more than 50,000 members responsible for more than 6 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing.

The National Multi Housing Council ("NMHC") is a national association representing the interests of the larger and most prominent apartment firms in the United States. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, and promotes the desirability of apartment living.

The San Diego County Apartment Association ("SDCAA") is a trade association serving the needs of individuals and companies who own, manage, or provide services and products to more than 150,000 rental housing units in San Diego County, California. The association's mission is to protect and preserve the economic vitality of the rental housing industry in San Diego County. SDCAA is

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[1] The parties' counsels of record have received timely notice of the intent to file this brief. The parties have consented to the filing of amicus briefs in this case and filed consent letters with the clerk. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

an affiliated association of the National Apartment Association.

The Apartment Association, California Southern Cities ("Southern Cities") began eight decades ago in Long Beach, California as a group of apartment owners united to improve the rental housing market. More than 69,000 apartment and rental property owners do business in the 54 cities of Southern Los Angeles County, which is the area represented by Southern Cities. The association supports the private property rights of its members and advocates for fair governmental treatment for multi-family residential businesses with respect to taxation, fees, land use, zoning, and other issues affecting the real estate industry. Southern Cities is an affiliated association of the National Apartment Association.

The Apartment Association of Orange County ("AAOC") is a nonprofit California corporation. The Association has approximately 3,000 members, consisting primarily of private individuals who own residential rental property. AAOC advances the economic, social, and educational interests of its members. AAOC has a strong interest in protecting the constitutional rights of its members, and in seeking to avoid dilution of those constitutional rights. AAOC is an affiliated association of the National Apartment Association.

The Apartment and Office Building Association of Metropolitan Washington (AOBA) is the leading membership organization representing commercial and multi-family residential real estate in the Washington, DC area. AOBA's mission is to protect and enhance the value of its members'

investments through effective leadership and advocacy, information exchange, and professional development. Currently, the combined portfolio of AOBA's membership is more 208,719 residential rental units in the District of Columbia, Maryland, and Virginia. AOBA is an affiliated association of the National Apartment Association.

One-third of American households rent their homes. As providers of rental housing, *amici* members face rent control regulations that substantially affect their ability to deliver affordable housing for residents while generating return for their investors. Rent control reduces the revenue apartment owners and managers need to maintain their existing assets while also reducing access to the capital needed in order to provide construction of new apartment homes and rental units.

SUMMARY OF ARGUMENT

The proclivity of governments' habitual acquisition of private property without compensation posed a sufficient concern to the Founders to cause them to include a prohibition of that practice in the Bill of Rights. Notwithstanding that prohibition, under the Takings Clause of the Fifth Amendment, government entities have continued to acquire and regulate private property often triggering disputes about the need for compensation. These disputes have resulted in an expanding body of judicial decisions on the application of the Takings Clause.

The Guggenheim's petition represents an opportunity for the Court to bring the Ninth Circuit's decision into conformance with other federal courts and the prior decisions of this Court, particularly *Palazzolo v. Rhode Island*, 533 U.S. 606

(2001). That decision contained six concurring and dissenting opinions, chiefly revolving around the ripeness of Mr. Palazzolo's claim. By contrast, in *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009) *rev'd en banc*, 2010 WL 5174984 (9th Cir. Dec. 22, 2010), the original panel decision raised and decided the ripeness issue *sua sponte*. The subsequent *en banc* decision, while reversing the panel, did not disturb the conclusion that the claim was ripe ("... we assume without deciding that the claim was ripe ..." Pet. App. 13a). The Guggenheim petition, therefore, presents the Court with an opportunity to clarify the application of the three factors identified in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977) without the dilution or distraction of collateral issues.

The Ninth Circuit erroneously held that the owner of a property acquired after the enactment of rent controls cannot maintain a takings claim. That decision has enormous implications for investment expectations in the real estate sector and merits the Court's attention.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THE COURT'S DECISION IN *PALAZZOLO*, WHICH EXPRESSLY FOUND THAT PARTIES WHO PURCHASE PROPERTY AFTER THE ENACTMENT OF RESTRICTIVE REGULATIONS ARE NOT BARRED FROM ASSERTING A TAKINGS CLAIM BASED ON THOSE REGULATIONS.

A state's regulatory action results in a *per se* taking when: 1) it requires an owner to suffer a

permanent physical invasion of his property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982); or 2) it deprives an owner of "*all* economically beneficially us[e]" of his property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original). In addition, under *Penn Central Transportation Co. v. New York City*, a regulation that limits an owner's use of land without eliminating "all economically beneficial" use of that land will result in a taking if "justice and fairness" require that the property owner be compensated for his loss. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). To determine whether justice so requires, a court should examine several factors, including "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action" which effects the interference. *Id.*

In this case, the Ninth Circuit declined to engage in a complete *Penn Central* analysis of the Guggenheim's claims because the Guggenheims purchased the property in question after the rent control regulation was promulgated. Pet. App. 14a-24a. Accordingly, the Ninth Circuit reasoned, the price that the Guggenheims paid for the property must have "reflected the burden of rent control," and thus the Guggenheims could not have had "distinct investment-backed expectations" with which the rent control provision could have interfered. *Id.* at 18a-19a. This finding, which conflicts with this Court's holding in *Palazzolo v. Rhode Island*, enabled the Ninth Circuit to avoid the question of whether

the transfer of wealth caused by rent control results in a regulatory taking. This Court has raised this question before, *see Yee v. City of Escondido*, 503 U.S. 519, 530 (1992), but has never resolved it. Granting certiorari will thus provide the Court with the opportunity to reinforce its *Palazzolo* holding and to remedy the unfair wealth transfer effected by rent control ordinances such as the one at issue in Goleta.

The Ninth Circuit's reasoning in *Guggenheim* ignores this Court's holding in *Palazzolo v. Rhode Island*, which determined that even a party who acquires property after a regulation is promulgated can assert a takings claim if the regulation has a sufficiently severe impact on that party's economic expectations. *Palazzolo v. Rhode Island*, 533 U.S. 606, 613-14 (2001). In *Palazzolo*, the state of Rhode Island repeatedly denied a corporation the right to develop several parcels of waterfront land. *Id.* at 613-14. Following the dissolution of the corporation, the property passed to the corporation's sole shareholder by operation of law. *Id.* at 614. When the state denied the shareholder the right to develop the property, he filed suit in state court, alleging that the State's wetland regulations, as applied to his property, had deprived him of "economically, beneficial use of his property, resulting in a total taking." *Id.* at 615-16. The Rhode Island Supreme Court disagreed, finding in part that "petitioner had no right to challenge regulations predating ... [his] legal ownership of the property." *Id.* at 616. Rejecting this reasoning, the Supreme Court found that the date the shareholder acquired the property was irrelevant.

> Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taki ıg because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the post enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use of land. ... A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

Id. at 627-28.

According to this Court's formulation, then, the mere fact that a party obtained his property following the enactment of a regulation does not justify a state's use of such a regulation to deprive the party of the reasonable use of his land.[2] *Id.*

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[2] *Palazzolo* ultimately upheld the Rhode Island regulations based on an analysis of other *Penn Central* factors. *Palazzolo v. Rhode Island*, 533 U.S. at 631.

The Ninth Circuit differentiated this case from *Palazzolo* for two reasons. *See* Pet. App. 14a-21a. First, the court noted that where *Palazzolo* addressed an as-applied challenge to an alleged taking, the Guggenheims asserted only a facial challenge to the City of Goleta rent control provision. *Id.* at 15a. Second, while the transfer of property in *Palazzolo* occurred by operation of law, the Guggenheims purchased their property on the open market. *Id.* The Ninth Circuit reasoned that these variances were relevant because

> [a]n as applied challenge necessarily addresses the period during which the administrative or judicial proceedings for relief occur, so justice may require that title transfers during the ripening period not bar the action. By contrast, there is no such extended period applicable to a facial challenge, because the only time that matters is the time the ordinance was adopted,...

and because in this case, the Guggenheims purchased the property after the County of Santa Barbara enacted the ordinance in question, which the city of Goleta later adopted. *Id.* at 15a-16a. Relying on these supposed distinctions, the majority refused to apply *Palazzolo* to the Guggenheim's situation. Instead, it found that because the Guggenheims had notice of the rent control provision when they purchased their property, they could not have reasonably anticipated an increased stream of income from the property. *Id.* at 18a-19a. Accordingly, the court reasoned, the Guggenheims failed to satisfy the portion of the *Penn Central* test

which requires courts to consider the economic impact of a regulation on a claimant's "distinct investment-backed expectations." *Id.* at 19a.

As Judge Bea's dissent observes, however, the majority improperly distinguished *Palazzolo* based on supposed differences that are in fact irrelevant. Regarding the question of whether courts can apply *Palazzolo* to a case which asserts only a facial challenge, Judge Bea notes, "If the *expectations* are valid and are expropriated, what does it matter as to their existence that they will be injured in all cases (facial challenge) or just in some (as-applied challenge)? Either they are valid expectations, or they aren't." *Id.* at 37a. Addressing the question of how the claimants obtained their property, Judge Bea observed,

> The plaintiff in *Palazzolo* acquired title after the challenged land-use restriction was enacted and nonetheless prevailed without claiming that he should be considered to have become the owner when his corporation bought the land before the restriction's enactment on some theory of advantageous piercing of the corporate veil *cum* relation back.

Id. at 36a.

In fact, the situation faced by the Guggenheims is substantially similar to that addressed in *Palazzolo*. In both cases, the state relied on a regulation in effect at the time a property holder purchased his land in order to limit the income the property owner could derive from that land. However, in both cases, when the new owners obtained title to the land in question, they received

the full property rights associated with that land, including the right to protest the state's interference with their investment-backed expectations. As the Court noted in *Nollan v. California Coastal Comm'n*, "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, n. 2 (1987). Based on this precedent, *Palazzolo* found that the mere fact that the shareholder obtained title to his property after the regulations were promulgated did not foreclose his ability to allege a takings violation based on those regulations because when he received title to the waterfront property, he also obtained the right to earn income from that property and to pursue a takings claim if the state unjustly prevented him from so using the property. *Palazzolo v. Rhode Island*, 533 U.S. at 629. Similarly, when the Guggenheims purchased the land on which their mobile-home park sits, all associated property rights, including the right to challenge the state's regulation, transferred to them. The fact that the regulation predated their ownership of the land is thus irrelevant: if the prior owners could have asserted a takings claim based on the regulations, so too can the Guggenheims.[3]

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[3] As Justice Scalia noted in his concurrence to *Palazzolo*,

> the fact that a restriction existed at the time the purchase took title ... should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The 'investment-backed expectations' that the law will take into account do not

Palazzolo does not suggest any reason that this holding should be limited to an as-applied challenge to a regulation. Rather, the Court in *Palazzolo* repeatedly rejects the "single, sweeping, rule" that "[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking" because such a rule would effectively "put an expiration date on the Takings clause." *Palazzolo v. Rhode Island*, 533 U.S. at 626. This is true for both a facial and an as-applied challenge: a blanket rule preventing a claimant from asserting a takings violation based solely on the date he acquired the property in relation to the date the regulation was promulgated would deny that petitioner his constitutional right to prevent the unjust taking of his property without compensation, regardless of whether the petitioner asserted an as-applied or facial challenge.

By misapplying *Palazzolo* and failing to engage in a complete *Penn Central* analysis, the Ninth Circuit failed to address the crucial issue in this case: whether the transfer of wealth caused by Goleta's rent control ordinance effects a regulatory taking. As the district court found, the ordinance artificially inflates the value of mobile homes by limiting the rental fees that mobile home park

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> include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking ... no less than a total taking, is not absolved by the transfer of title.

Palazzolo v. Rhode Island, 533 U.S. at 637 (Scalia, J., concurring).

owners can charge for the use of mobile home "pad" spaces. Pet. App. 98a-99a. As a result, existing mobile home owners are able to sell their homes at a premium – on average, at around $100,000 for a mobile home with an actual value of $12,000.. *Id.* at 101a. By contrast, mobile home park owners only earn about 20% of the rental income they would earn if no rent control statute were in effect. *Id.* at 100a. In essence, then, the rent control ordinance "transfers wealth only to the incumbent mobile home owner," *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992), and deprives mobile home park owners of income to which they would otherwise be entitled.[4]

In *Yee*, this Court suggested that such a wealth transfer might result in a regulatory taking, but did not resolve this question because *Yee* only alleged a *per se* physical invasion. *Yee v. City of Escondido*, 503 U.S. at 530. By contrast, this case specifically alleges that rent control effects a regulatory taking. It thus gives the Court an

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[4] Rent control also negatively impacts the greater local economy. The Guggenheim's expert witness, Dr. Quigley, described the widespread effect of rent control as follows:

> For every dollar by which housing costs are reduced through lower mobile home rents, consumers are forced to pay higher purchase prices for these mobile homes. These two effects roughly cancel. Thus, the principal effect of the rent control regulation is to inhibit increases in the supply of affordable housing in the market and consequently to increase rents in the local economy. The principal costs are borne by those consumers who otherwise would have been able to reside in lower cost housing in the region.

Pet. App. 100a.

opportunity to rectify the fact that the transfer of resulting from rent control forces mobile home park owners to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)), by severely interfering with their direct investment-backed expectations and depriving them of 80% of the value of rental income which they would otherwise earn, based on an ineffective government purpose.

By inaccurately interpreting *Palazzolo* and *Penn Central*, the Ninth Circuit declined to even consider that the type of wealth transfer caused by rent control measures might result in a regulatory taking, even though *Yee* suggests that this might well be the case. This Court should thus grant certiorari in order to determine whether the type of wealth transfer effected by rent control qualifies as a regulatory taking, and if so, to justly compensate the mobile park home owners affected by this taking.

II. RENT CONTROLS HAVE HISTORICALLY BEEN VIEWED AS TEMPORARY MEASURES ENACTED AND REVISED IN RESPONSE TO EXTRAORDINARY HOUSING MARKET CONDITIONS.

Historically, rent controls were enacted as temporary measures aimed at addressing unique economic conditions. The usual economic conditions that give rise to enacting rent controls are periods of major war and peace time periods of rapid general inflation.[5] Rent control proponents claim that

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[5] Downs, *A Reevaluation of Residential Rent Controls*, 1996, at p. 9.

temporary controls are justified during such periods as without the controls the unique combination of economic factors would allow property owners to raise rents to unfairly high levels.

Rent controls first appeared in the United States during World War I. These controls were limited to a small number of communities that had experienced severe housing shortages. These controls were phased out soon after the war ended. During World War II, demand for housing in metropolitan areas soared as thousands of new workers moved to cities. To house these new workers, additional rental units were needed. However, in order to conserve materials for war production, the building of new rental units was prohibited in most areas. This combination of high demand and restricted supply had the potential to push rent prices to higher levels than had previously prevailed. In 1942, the federal government enacted the Emergency Price Control Act, 56 Stat. 23, 50 U.S.C. Appx. §§ 901 *et seq.* Under this statute, nationwide rent controls were put into effect as part of a general price control program. When the Emergency Price Control Act expired in 1947, Congress passed the Federal Housing and Rent Act of 1947. Under the 1947 Act, all communities in the United States remained under rent controls until 1949. However, these controls were once again dismantled as the economic conditions that gave rise to them concluded.

Periods of rapid general inflation have also spurred the adoption of rent control measures. In fact, most rent control laws still in effect today have their origins in the period of hyperinflation which

took place during the 1970s. The first of these regulations was enacted in 1971 when the federal government imposed a 90 day price, wage, and rent freeze for the entire country. This regulation was followed by a period of flexible price stabilization[6] that lasted until January 1973 when more normal economic conditions returned.[7]

In the later 1970s, several U.S. cities adopted rent controls in response to rapid inflation mainly caused by increases in world petroleum prices. Changing economic conditions coupled with a recognition of the consensus among economic scholars that rent control policies discourage investment in new and existing rental housing, some cities have began the process of ending rent control regulations. Boston, Massachusetts began this trend by eliminating rent control in 1994. A prominent example is found in New York, with the passage of the Rent Regulation Reform Act of 1997 the state established its newest major rent control system.[8] The act continued a decades long trend of moving

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[6] Traditional rent control statutes set a maximum ceiling on the amount of rent a property owner may charge a resident for a particular type of rental unit. On the other hand, rent stabilization sets maximum rates for annual rent increases without setting a maximum rent ceiling.

[7] Downs, *A Reevaluation of Residential Rent Controls*, 1996, at p. 30-32.

[8] Since the inception a rent control system in New York State, which primarily but not exclusively focuses on New York City, at least seven major overhauls to the system have been enacted. Of additional note, during 2010-2011 alone the state legislature has considered over one hundred bills which make smaller adjustments to the rent control system.

New York from a strict rent control regime to rent stabilization and vacancy decontrol.[9]

Even today many of the rent regulations that remain in effect are "temporary" in recognition that economic conditions change and thus the purported utility of such measures will end. For example, major pieces of New York State's rent control statutes are set to fully expire in June of this year unless renewed by the state legislature.[10] A further example may be found in the District of Columbia, where until 2010, the city's rent control ordinance expired every five years. Under the 2010 amendment the ordinance will sunset in 10 years.[11]

Statutes and ordinances in the United States have ranged from temporary traditional rigid rent controls that often hold rents far below real market levels to contemporary laws that slow rent increases. Like the rental markets they regulate, rent control regimes change over time. For this reason, assumptions regarding, the existence or changes to rent control conditions from one form of regulation to another will impact a property investor's investment backed expectations. As periodic government intervention in housing markets is often followed by withdrawal from those markets sophisticated investment expectations should reflect that fact.

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[9] Under vacancy decontrol once an established resident vacates a unit that unit is removed from the rent control system thereby allowing the property owner to rent the unit at market rate.

[10] The Emergency Tenant Protection Act of 1974 and the Emergency Housing Rent Control Law of 1946.

[11] *See* D.C. Law 6-10 and D.C. Official Code § 42-3509.07.

III. THE NINTH CIRCUIT'S STATIC ANALYSIS OF A FLUID REAL ESTATE MARKET RESULTS IN A LEGAL FICTION

The Ninth Circuit held that Petitioners suffered no loss of investment backed expectations because the rent control ordinance was enacted before the land was purchased. Pet. App. 17a-19a. The Court reasoned that the petitioners bought the property at a reduced price that reflected the mandated eighty percent discount on rental income and therefore were precluded from recovery. *Id.* However, the Ninth Circuit's ruling is premised on a foundation of legal fiction that the real estate market is static and investment expectations are set forever at the time of rent control enactment or property purchase. Essentially, the court held that if an investor buys under the conditions of a rent control statute, they are precluded from future relief simply because the expectation of such relief from the ordinance would be "speculative." *Id.* In reality, the real estate market is fluid, and fluctuations in economic conditions can render previously benign regulations into compensable takings.

A myriad of variable economic factors affect rental property investments including rents, interest rates, the availability of credit, employment and job growth, personal income, population, construction and maintenance costs, commodity and energy prices, vacancy rates, housing supply, property taxes, and insurance costs. Many of these factors continue to change on a quarterly, if not daily basis. In fact, an analysis of the Santa Barbara County[12] apartment market for the years 2005-2010 done by

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[12] The City of Goleta is located in Santa Barbara County.

REIS, Inc. illustrates that rents, vacancy rates, employment, and population are anything but static. See: REIS, Inc. Santa Barbara Apartment 4th Quarter 2010 Performance Monitor. From 2005-2010 vacancy rates ranged from a low of 3.3 to a high of 6.7 percent. *Id.* The population grew from 399,000 to 414,550 and average household income rose from $126,000 in 2005 to $140,276 in 2010. *Id.* The county suffered negative employment growth in 14 quarters from 2005 to 2010. *Id.* Predictably rents followed the fundamental trends – rents grew when occupancy rates and household income were high, but dipped as employment and income fell. *Id.*

Because rental housing fundamentals are not static, it is superficial to reason that the economic impact of rent control can be determined only at the time of enactment. As noted above, subsequent statutory modifications or extensions will occur at times of radically different economic conditions. In denying petitioners' claim, the Ninth Circuit fixates on the premise that since the Guggenheims' purchase of the property was post enactment, any thought of a statutory adjustment amounted to "speculation" and not a reasonable investment backed expectation. Pet. App. 17a-19a. The price paid, the court reasoned, was discounted as a result of the rent control statute that was then in existence, and constitutional protections do not apply to speculative investment dreams of a "windfall" of higher rents due to the removal of the rent control statute. *Id.* However, this logic ignores the reality that a relatively benign rent control statute could become very onerous if, for example, rents cannot be adjusted to accommodate higher property taxes, labor or energy costs. Under the Ninth Circuit's

view, current rents and resale value under the rent control regime are the purchaser's only true investment backed expectation, not the ability to maintain buildings, pay higher taxes, or generate the positive cash-flow necessary for the properties to stay in business.

In recent years, the United States has experienced an overabundance of easily financed housing stock where it was actually easier for persons to buy homes rather than rent. The wave of foreclosures that followed disrupted both the owner occupied and rental housing markets. The loss of jobs and subsequent high unemployment rates predictably resulted in rental vacancies where unemployed persons move back to live with their families. This was illustrated by the recently released Southern California Multifamily 2010 Report.[13] A portion of the report chronicled the impact of the loss of 222,000 jobs in the Los Angeles market where certain jurisdictions have adopted rent control and the subsequent 12.6% unemployment rate. As a consequence, rents declined 12.9% in 2009. *Id.* at 15-16.

The impact of a rent control ordinance in a housing market with strong demand and high occupancy levels presents challenges to owners and operators of rental housing. When rent control exists in a market with falling rent prices and occupancy levels, the costs associated with rent control are magnified. Similarly, current difficulties in obtaining financing have caused many owners to

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[13] Southern California Multifamily 2010 Report published by the University of Southern California Lusk Center, Casden Real Estate Economics Forecast.

default on mortgage obligations resulting in an unprecedented number of receiverships. Since one of the *Penn Central's* three areas of analysis is the interference with investment-backed expectations, it makes perfect sense to allow post-enactment purchasers the right to challenge statutes that newly infringe upon this important property right. The City of Goleta "failed" to review the County Code or make any findings on whether there was a purpose or need for the rent control ordinance as it related to the current real estate market. *Guggenheim v. City of Goleta*, at 1002. In essence, The City of Goleta and later the Ninth Circuit ignored the fact that reasonable investments backed expectations will vary tremendously in response to market movement.

The market turmoil described above, will necessarily influence changes in ownership in addition to the everyday business reorganizations and passages of title through inheritance. The Ninth Circuit has held that subsequent post enactment owners cannot have standing to challenge statutes that they claim constitute takings so that the injury may only be asserted by the original owner at the time of enactment. Yet this view was explicitly rejected in *Palazzolo v. Rhode Island*, 533 U.S. at 630. The view that a subsequent owner could bring a challenge was noted by a number of the justices despite their disagreements on many other aspects of the case.

CONCLUSION

Amici certainly agree with petitioners' legal analysis and the importance of resolving a split of ruling among the federal circuits.

We respectfully urge the Court to grant the petition for certiorari because rent control impacts significant portions of the national real estate markets. If a property owner brings a takings challenge in response to the imposition of a rent control statute, that owner should be entitled to an adjudication under the Penn Central factors, rather than be denied that opportunity depending upon when the property was purchased.

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Respectfully submitted,

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In The

Supreme Court of the United States

DANIEL GUGGENHEIM, ET AL.,

Petitioners,

v.

CITY OF GOLETA, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page(s)

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Court Below Misconstrued *Palazzolo v. Rhode Island*, Un-Reasonably Limiting the Availability of the Fifth Amendment 3

II. Because Regulatory Takings Claims Run With the Land, All Subsequent Property Owners are Entitled to Challenge Existing Regulations Under the Fifth Amendment 9

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Appolo Fuels, Inc. v. United States, 381 F.3d 1338 (Fed. Cl. 2004) 8

Czech v. City of Blaine, 253 N.W.2d 272 (Minn. 1977) 9-10

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Page(s)

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Other

Stephen E. Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations (A Call to Critically Reexamine the Meaning of Lucas)*, 13 J. Land Use & Envtl L. 161 (Fall 1997) 11

Eric D. Albert, *If the Shoe Fits, [Don't] Wear it: Preacquisition Notice and Stepping Into the Shoes of Prior Owners in Takings Cases After Palazzolo v. Rhode Island*, 11 N.Y.U. Envtl. L. J. 758 (2003) 5

J. David Breemer, Playing the Expectations Game: *When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?* 38 Urb. Law 81 (Winter 2006).....14

TABLE OF AUTHORITIES (*cont.*)

Page(s)

J. David Breemer and R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, And the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Sw. U. L. Rev. 351 (2005) 12

Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. Haw. L. Rev. 533 (Summer 2002) 3

Edward H. Ziegler, Jr., Arden H. Rathkopf, and Daren A. Rathkopf, *1 Rathkopf's The Law of Zoning and Planning* § 6:30 (4th ed. Supp. 2011) 9

TABLE OF APPENDICES

Page(s)

Appendix A..... 1A

INTEREST OF *AMICUS CURIAE*

The National Association of Home Builders (NAHB) has received the parties' written consent to file this *amicus curiae* brief in support of Petitioner.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders or remodelers, and its builder members construct about 80 percent of the new homes each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). It also has participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive

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[1] Under Rule 37.6 of the Rules of this Court, *Amicus* state(s) that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, or its counsel contributed monetarily to the preparation and submission of this brief. Counsel of record for all parties received timely notice of the intent to file the brief under Rule 37.2(a), and letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

regulation under a wide array of statutes and regulatory programs. *See* Appendix A.

NAHB's organizational policies have long advocated that property owners must be able to challenge unconstitutional regulations. Central to this issue is the principle that property interests are not solely dependent on temporal aspects of property ownership. NAHB members frequently face regulation that eliminates the economically viable use of their property, and it supports the ability of any property owner to challenge unconstitutional conditions that have been imposed on, rather than created by, a property owner.

The Court should grant certiorari to clarify that *Palazzolo* applies to all subsequent property owners, regardless of how they came to hold title. Correcting the Ninth Circuit's attempt to deprive yet another group of property owners access to the Fifth Amendment's Takings Clause is essential given the myriad of roadblocks that already block the path to the courthouse door.

SUMMARY OF ARGUMENT

In the decision below, the Ninth Circuit attempts to unreasonably limit this Court's determination that a "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001). Specifically, the Ninth Circuit seeks to apply this principle only to a relatively small segment of property owners—those who obtained land by operation of law from predecessors in title who had already brought a state law takings

claim. Such a narrow interpretation is contrary to the intention that property owners' constitutional rights have continuity and uniformity.[2]

The Ninth Circuit's formulation not only violates the principles enunciated in *Palazzolo*, but also fails to comport with nationwide state law precedent that constitutional rights, including regulatory takings claims, run with the land.

ARGUMENT

I. The Court Below Misconstrued *Palazzolo v. Rhode Island*, Unreasonably Limiting the Availability of the Fifth Amendment.

The Ninth Circuit has found a new way to prevent property owners from bringing regulatory takings claims. It badly misconstrued two aspects of this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). As a result, the Ninth Circuit has ignored this Court's admonition against a rule that "would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." *Id.* at 627.

First, the Ninth Circuit seeks to limit the availability of the Fifth Amendment to property owners who obtain title to their land after the enactment of a regulation. In the decision below,

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[2] Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. Haw. L. Rev. 533, 546 (Summer 2002) ("The buyer's rights are subject to legitimate regulation, but cannot be extinguished by dint of a preexisting statute.").

such post-enactment property owners can only bring a regulatory takings claim under a narrow set of factual circumstances. *Guggenheim v. City of Goleta*, 2010 WL 5174984 (9th Cir. Dec. 22, 2010). This rationale fundamentally alters the plain meaning of this Court's decision in *Palazzolo*.

Second, the Ninth Circuit ignored substantial state law precedent that regulatory takings claims run with the land. Section II explains that these decisions clearly show the Ninth Circuit's analysis would not only eliminate the ability of many property owners to challenge unconstitutional regulations, but would also have negative consequences to effective land use planning.

In the decision below, the Ninth Circuit imposed a test where most subsequent title holders with notice of existing regulations are foreclosed from bringing regulatory takings claims. Under this test, post-enactment purchasers only have viable regulatory takings claims when a transfer occurs "by operation of law, during the period of time when the owner was ripening the claim by exhausting state remedies." *Guggenheim*, 2010 WL 5174984 at *4. Thus, when a property owner purchases land in an arms-length transaction, they lose the right to just compensation as to any existing regulations. Moreover, the previous title holder must have been actively pursuing a regulatory takings claim in state court.

Under the Ninth Circuit's test, notice of pre-existing regulations is *per se* fatal to a property owner's regulatory takings claim in the vast majority of circumstances. Indeed, because the Guggenheims

purchased their property on the open market, the Ninth Circuit explained that this eliminates their right to challenge the constitutionality of the regulation.

This holding misconstrues *Palazzolo* because the Court did not make a hard and fast distinction between post-enactment owners who acquired property by operation of law as compared to on the open market. Rather, *Palazzolo* correctly points to post-regulatory enactment owners who received title to property while their predecessor sought to ripen a regulatory takings claim as a particularly egregious example of where a *per se* regulatory notice rule would be unfair. *Palazzolo*, 533 U.S. at 627-628.

In fact, this Court acknowledges that a post enactment *purchaser* may still have a valid regulatory takings claim because some "enactments are unreasonable and do not become less so through passage of time or title." *Id.* at 627. While this analysis does not eliminate the inherent risk of government regulation, it stands for the proposition that regulation can have a lingering confiscatory effect even when property is purchased with full knowledge of the regulation's existence.[3] Courts simply cannot assume, as the Ninth Circuit did, that

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[3] "Palazzolo holds that the fact that a claimant's expectations should have been reduced by what she knew of an existing land-use regulatory scheme prior to purchasing her land cannot bar her claim entirely, which allows a claimant to pass the threshold requirement that some property interest has been taken away." Eric D. Albert, *If the Shoe Fits, [Don't] Wear it: Preacquisition Notice and Stepping Into the Shoes of Prior Owners in Takings Cases After Palazzolo v. Rhode Island*, 11 N.Y.U. Envtl. L. J. 758, 767-768 (2003).

the inherent cost of existing regulations have been bargained for when property is purchased.

Justice O'Connor's concurrence in *Palazzolo* also shows that the Ninth Circuit missed the point in *Guggenheim*. Justice O'Connor explained that *Palazzolo* "does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry." *Id.* at 635-36 (O'Connor, J., concurring).

The Ninth Circuit, in contrast, seeks to use pre-acquisition notice as a *per se* test for investment backed expectations in all but the narrow circumstances described above. In its investment-backed expectations analysis, the court determined that, because the Guggenheims had knowledge of the rent control ordinance's restrictions, they could not have investment backed expectations. *Guggenheim*, 2010 WL 5174984 at *5. Because this notice existed, the Ninth Circuit failed to examine the reasonableness of the ordinance itself. By brushing aside such considerations, the Ninth Circuit failed to "attend to those circumstances which are probative of what fairness requires in a given case." *Palazzolo*, 533 U.S. at 635.

The Ninth Circuit's willful blindness to this approach is surprising given this Court's consistent application of a case-by-case analysis to pre-acquisition notice in the context of regulatory takings claims.

For example, in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002),

the Court reiterated that the investment-backed expectations prong of *Penn Central* depended on a number of factors, including how long a regulation has been in effect. *Id.* at 326-37. *Tahoe-Sierra* acknowledged that how long a regulation has been in effect does not always correlate to whether a taking has occurred.

The Ninth Circuit has not only misconstrued *Palazzolo,* but has also gone against the grain of other decisions by this Court. A *per se* notice defense was categorically rejected in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 (1987). In *Nollan,* this Court rejected the argument that the property owners could not challenge an exaction because it existed at the time the owner purchased the property. *Id.* at 833. The existence of the Coastal Act—which enabled the exactions at issue—did not serve to eliminate the Nollan's property rights.[4] This Court then expressly applied *Nollan's* holding to *Penn Central* takings in *Palazzolo.*[5]

The Federal Circuit and the United States Court of Federal Claims, which have been on the vanguard of this issue, have reached the opposite conclusion to the Ninth Circuit. For example, a recent Federal Circuit case echoed Justice O'Connor, stating that

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[4] "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Nollan*, 483 U.S. at 833 n.2.

[5] A claim under *Penn Central* is "not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo*, 533 U.S. at 630.

"knowledge of [a] regulation is not per se dispositive, although it is a factor that may be considered, depending on the circumstances." *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1366 (Fed. Cir. 2009).[6]

Similarly, the United States Court of Federal Claims explained that the investment-backed expectations analysis for a post-enactment purchaser should not merely focus on the purchaser's knowledge, but must also look to the specific facts of the regulatory scheme at issue. *Norman v. United States*, 63 Fed. Cl. 231, 266 (Fed. Cl. 2004). While the court ultimately found no taking, it conducted an exhaustive analysis of whether the property owners had a reasonable expectation to develop property under the Clean Water Act.

The Ninth Circuit's test under *Guggenheim* simply does not account for these nuances of property ownership. For this reason, *Guggenheim* failed to heed Justice O'Connor's statement that notice of an existing regulation is only a non-dispositive factor in the broader investment-backed expectations analysis.

Thus, the Ninth Circuit's test simply does not allow for a meaningful investment-backed expectation analysis for post-enactment purchasers. This not only turns the clock back on this Court's decision in *Palazzolo*, but it also ignores a long line

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[6] *See also, Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cl. 2004) (applying a facts and circumstances analysis to a post-enactment regulatory takings claim).

of state law precedent regarding the rights of ownership that pass with title.

II. Because Regulatory Takings Claims Run With the Land, All Subsequent Property Owners are Entitled to Challenge Existing Regulations Under the Fifth Amendment.

Courts have held that later property owners retain the right to bring constitutional challenges relating to existing conditions on the land.[7] Therefore, a subsequent title holder may challenge unconstitutional conditions to the use of his land, regardless of when those conditions were imposed.

In the context of regulatory takings, this principle is based on the notion that "an owner has a reasonable investment-backed expectation that land use and development will not be burdened by unconstitutional development restrictions." Edward H. Ziegler, Jr., Arden H. Rathkopf, and Daren A. Rathkopf, *1 Rathkopf's The Law of Zoning and Planning* § 6:30 (4th ed. Supp. 2011). Regulatory takings claims, in other words, run with the land. State courts have frequently upheld this principle in the context of challenges to land use regulations.[8]

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[7] These decisions "generally hold that a later owner may successfully assert a regulatory taking[s] claim unless the hardship in question was truly self-created by the owner or a predecessor in title and not by simply government regulatory action." *Id.*

[8] *See, e.g. Negin v. Bd. of Bldg and Zoning Appeals of City of Mentor, et al.*, 433 N.E.2d 165 (Ohio 1982) (pre-existing minimum lot size ordinance resulted in a taking); *Czech v. City*

A New Jersey appeals court applied the same principles to determine that, while reasonable investment-backed expectations include notice of existing regulations, property rights with regard to those regulations generally pass to subsequent property owners. *Karam v. State, Dept. of Envtl. Protection*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998), abrogated on other grounds by *Panetta v. Equity One, Inc.*, 920 A.2d 638 (N.J. 2007). The court explained that "[T]he right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." *Id.*

An earlier New Jersey case came to a similar conclusion. In *Moroney v, Mayor and Council of the Borough of Old Tappan*, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993), property owners sought a lot size variance based on an ordinance that existed at the time they purchased the property. The court rejected the municipality's argument that the property owner had no investment-backed expectations because they knew of the zoning restriction prior to purchasing the property. *Id.* at 1049. The court explained that "[w]here the owner or predecessor in title has not created the hardship, the focus is upon the property and not the owner." *Id.* This rule takes into account the fact that there are often valid circumstances were prior property

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of Blaine, 253 N.W.2d 272 (Minn. 1977) (holding that taking occurred where property owner denied rezoning of mobile home ordinance).

owners are not able to bring regulatory takings claims.[9]

In other words, the Ninth Circuit's attempt to divest an entire class of property owners from the principle that takings claims run with the land will create an unfair result. Commentators have noted that these holdings undermine the integrity of the Fifth Amendment itself.[10]

In fact, it is only appropriate to divest a new property owner of her constitutional rights when she has created her own hardship. Notice of a regulation alone, however, does not result in a self created hardship.

In *Richard Roeser Prof'l. Builder, Inc. v. Anne Arundel County*, 793 A.2d 545 (Md. 2002), a property

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[9] "There are many reasons why a prior owner might not have pursued a taking[s] claim. For example, a prior owner may have lacked the financial resources to develop the property or to commence an action on a taking claim." *Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1043 (N.Y. 1997) (Wesley, J., concurring); *see also, Ward et al. v. Bennett, et al.*, 592 N.E.2d 787, 790 (N.Y. 1992) (holding that property owner was entitled to have their takings claim adjudicated).

[10] *See* Stephen E. Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations (A Call to Critically Reexamine the Meaning of Lucas)*, 13 J. Land Use & Environmental L. 161, 195-196 (Fall 1997) ("If the Fifth Amendment's Takings Clause is to have any meaning, decisions affecting its application must be universally understood and accepted . . . There can be no exceptions to the Takings Clause for new owners, nor can property be redefined any time a statute or ordinance is passed or a zoning decision made. Such conditions risk reducing the Takings Clause to a hollow shell.").

owner contended that the denial of a variance from an existing environmental critical area resulted in a taking. An appeals court held that the owner had created his own hardship by seeking a variance with full knowledge of the development restrictions.

The Court of Appeals of Maryland disagreed, holding that the builder's knowledge of regulations prior to the purchase of the property was not a self-created hardship. Citing *Palazzolo,* the court held that a subsequent purchaser continued to be entitled to just compensation where a cognizable takings claim exists. The court noted that "hardships that are normally considered to be self-created in cases of this type do not arise from purchase, but from those actions of the landowner, himself or herself, that create the hardship, rather than the hardship impact, if any, of the zoning ordinance on the property." *Id.* at 558.

The Ninth Circuit in *Guggenheim* has rejected the widely held principle that regulatory takings claims run with the land for all subsequent title holders.[11] As a result, the availability of the Fifth Amendment has, for all practical purposes, been eliminated for an entire class of property owners. The *Guggenheim* decision also creates adverse policy

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[11] "[A]pplication of the regulatory notice rule typically causes a stick in the bundle of rights held by the pre-enactment purchaser—the right to make use of land in particular ways or obtain compensation—to disappear upon transfer of title." J. David Breemer and R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, And the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck,* 34 Sw. U. L. Rev. 351, 384 (2005).

results for both property owners and local communities.

Massachusetts' high court addressed this issue in *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994). In *Lopes*, the court upheld the property owner's regulatory takings case against an existing zoning ordinance even though the owner has purchased the land with full knowledge of environmental buffers that would limit the property's development potential. *Id.* at 1313. The court explained that:

> A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them . . . would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.

Id. at 1315. The Ninth Circuit's decision will lead to exactly this problem. Any property owner who purchased their land after enactment of a statute or regulation would result in zoning laws having different effects on different property owners depending solely upon when they purchased the land.

In addition, the Ninth Circuit's paradigm creates moral hazards in the context of land development. Specifically, property owners will be incentivized to

develop property sooner than appropriate to avoid a notice preclusion rule like that in *Guggenheim*. [12]

Incentivizing the development of land prematurely is problematic for both property owners and local government. This creates unnecessary hardships for property owners and results in poorly planned land use and development. The alternative risk is that future property owners will be foreclosed from challenging unconstitutional land use controls. That result should be equally unacceptable to this Court.

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[12] J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?* 38 Urb. Law 81, 98 (Winter 2006) ("When the landowner has acquired property prior to regulation, and is therefore not subject to the standard regulatory notice rule, state courts may nevertheless deem development expectations unreasonable if the claimant delayed building until after a preclusive regulatory regime went into effect.").

CONCLUSION

For the reasons state above, the Court should grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

DATED: April 8 , 2011.

Respectfully submitted,

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TABLE OF APPENDICES

Page(s)

Appendix A..... 1A

APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me.*

Bd. of Envtl. Prot., 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 2097 (2010) (No. 09-846); *Sackett v. United States Environmental Protection Agency*, (2011) (No. 10-1062).

185

(5)

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In the Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

v.

CITY OF GOLETA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that "postenactment purchasers cannot challenge a regulation under the Takings Clause." *Id.* at 626. In this case, a divided *en banc* panel of the Ninth Circuit distinguished *Palazzolo* on the basis that the plaintiff there had acquired the property by operation of law (instead of purchasing it) and held that the fact that petitioners had purchased the property subject to the challenged regulation was "fatal to [petitioners'] claim."

Is the purchaser of property subject to a regulatory restriction foreclosed from challenging the restriction as a violation of the takings clause?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE* 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 7

I. Prior to the Decision Below, Small Businesses Regularly Challenged Pre-Existing Burdens On Their Land 7

II. The Decision Below, By Stripping Buyers of the Ability to Challenge Pre-Existing Burdens, Will Disrupt The Commercial Real Estate Market To The Disadvantage of Small Businesses 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Bolger v. *Village of Mount Prospect*,
141 N.E.2d 22 (Ill. 1957) 13

Chusud Realty Corp. v. *Village of Kensington*,
22 A.D.2d 895 (N.Y. App. Div. 1964) 13

City of Rome v. *Pilgrim*,
271 S.E.2d 191 (Ga. 1980) 11

City of Sherman v. *Wayne*,
266 S.W.3d 34 (Tex. App. 2008) 8

Kropf v. *City of Sterling Heights*,
215 N.W.2d 179 (Mich. 1974) 11

La Salle Nat'l Bank v. *City of Evanston*,
179 N.E.2d 673 (Ill. 1962) 11

Moeller v. *City of Moline*,
200 N.E.2d 93 (Ill. App. 1964) 13

Palazzolo v. *Rhode Island*,
533 U.S. 606 (2001) ..... *passim*

Penn Central Transp. Co. v. *New York City*,
438 U.S. 104 (1978) 5, 6, 12

Shatz v. *Phillips*,
471 S.W.2d 944 (Tenn. 1971) 10, 11

State ex. rel. Shemo,
765 N.E.2d 345, 352 (Ohio 2002) 11

Vernon Park Realty, Inc. v. *City of Mount Vernon*,
121 N.E.2d 517 (N.Y. 1954) 9, 10

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District of Columbia Office of Planning, Industrial Land in a Post-Industrial City, District of Columbia Industrial Land Use Study: A Detailed Investigation of Industrial Land in the District of Columbia and role of Production, Distribution and Repair Industries in the District Economy (Aug. 2006) 14

James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. Small & Emerging Bus. L. 49 (2001) 1, 2

National Federation for Independent Business, National Small Business Poll, Vol. 8, Issue 7 (2008) 14

National Federation for Independent Business, Small Business Credit in a Deep Recession (2010) 1

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

In 2008, there were 5,911,663 small businesses in the United States.[2] Office of Advocacy, U.S. Small Business Administration, Small Business Profile, 1 (Feb.2011) *available at* http://www.sba.gov.sites/ default/files/files/us10.pdf. These businesses employed 59,693,991 people, amounting to 49.6 percent of private-sector jobs. *Id.* These small business owners hold substantial amounts of real estate. National Federation for Independent Business, Small Business Credit in a Deep Recession, 18 (2010). Ninety-five percent of small employers own their primary residence, their business premises or their investment real estate; fifty-five percent own two and eighteen percent own all three. *Id.* at 19-21. Forty-nine percent of small employers whose businesses reside on commercial real estate, own all or part of the building and/or the land on which their business is located. *Id.* at 19.

Despite the significant contributions that small businesses make to the U.S. economy, state and local governments "frequently fail to consider costs imposed on small businesses as a result of new or expanded regulations." James L. Huffman & Elizabeth

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[1] The parties have consented to the filing of this brief. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Small businesses are defined by the Small Business Administration as businesses with fewer than five hundred employees.

Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. Small & Emerging Bus. L. 49, 50 (2001). Land-use regulations significantly impact small businesses by "influenc[ing] property acquisition costs, construction expenses, operating costs, employee salaries, and legal fees required to start and operate a small business." *Id.* at 50-51.

Small businesses are less able to mount timely legal challenges to burdens on their property than larger companies with greater resources. "Regulations that impose burdensome costs on small business and which function as barriers to entry can work to the competitive advantage of large businesses." *Id.* at 69. Because the costs of land-use regulations are relatively fixed, economies of scale allow larger businesses to better deal with the costs of the regulations. *Id.* at 68.

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents over 300,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

NFIB regularly monitors for significant cases that are likely to affect the rights of small businesses. This is one such case. If allowed to stand, the decision below would eliminate any incentive for small businesses to buy land encumbered by suspect ordinances or other burdens that the buyer perceives as vulnerable to challenge in court. This is a change in the law that not only threatens the liquidity of the commercial real estate market, but also threatens to stifle the efficient formation of new businesses by reducing the supply of available commercial properties. This change will also depress market values of existing properties subject to suspect regulatory burdens, jeopardizing the financing of many small businesses who borrow against the value of their real property.

NFIB and its membership oppose such a change, and urge this Court to grant certiorari and reverse the decision below.

STATEMENT

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that "postenactment purchasers cannot challenge a regulation under the Takings Clause." *Id.* at 626. In this case, a di-

vided *en banc* panel of the Ninth Circuit found petitioners to be barred because the ordinance was "promulgated long before [petitioners] bought their land." Appendix to Petition in No. 10-1125 ("Pet. App.") at 14a. Because the Ninth Circuit's holding "directly contravenes Supreme Court precedent" *Id.* at 35a (Bea. J. dissenting), this Court should grant certiorari.

In 1979, Santa Barbara County, California adopted a rent control ordinance for mobile homes. *Id.* at 4a n.1. The ordinance limits the ability of park owners to increase rent of existing tenants; owners may only do so once a year, or at the termination of a lease term. *Id.* at 6a n.5. In addition, the amount of the increase is determined through arbitration. *Id.* Park owners may automatically raise rent by 75 percent of the local consumer price index, and may seek additional increases for various reasons provided in the ordinance. *Id.* When a tenant sells his or her mobile home to a new tenant, the park owner may only increase the rent by 10 percent. *Id.*

In 1997, eighteen years after the enactment of the ordinance, petitioners Daniel and Susan Guggenheim and Maureen H. Pierce purchased a mobile home park. *Id.* at 6a. The Guggenheims believed that they could free their land from the ordinance either through the grant of a zoning variance, political action targeted toward repealing the regulation in its entirety, or court action to invalidate the law. *Id.* at 41a.

Five years later, the City of Goleta (hereinafter "Goleta") incorporated the land on which the mobile

home park is located. *Id.* at 6a. Goleta subsequently adopted the Santa Barbara County code. *Id.* at 7a. That same year, the Guggenheims sued Goleta claiming that the rent control ordinance constituted a taking. *Id.* at 8a. The Guggenheims argued that by locking in rent at below market prices and allowing tenants to sell their homes to buyers who will still enjoy the benefits of the controlled rent, the "ordinance shifts much of the value of ownership of the land from the landlord to the tenant." *Id.* The Guggenheims' expert's report opined that without the ordinance rents for sites in their mobile home part would average $13,000 per year, but less than $3,300 with the ordinance. *Id.* at 8a-9a.

After a protracted procedural course, the District Court for the Central District of California granted Goleta's motion for summary judgment. *Id.* at 142a. The Ninth Circuit reversed, but decided to hear the case *en banc*. *Id.* at 9a-10a. A divided *en banc* panel vacated its earlier decision and affirmed the judgment of the district court. *Id.* at 10a. *The en banc* majority stated that *Palazzolo* was of "no help to the Guggenheims." *Id.* at 14a. The court distinguished the plaintiff in *Palazzolo* by noting that he acquired title by operation of law and "not because he bought the property for a low price reflecting the economic effect of the regulation." *Id* at 15a. In contrast, the Guggenheims owned the mobile home park "at all relevant times." *Id* at 16a. Analyzing the Guggenheim's claim under this Court's decision in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) the majority held that "the extent to which the regulation has interfered with distinct investment-backed expectations is fatal to the Guggen-

heims' claim." *Id.* at 18a (internal quotations omitted). In other words, because they purchased the park after the enactment of the ordinance, the Guggenheims "had no concrete reason to believe that they would get something much more valuable, because of hoped-for legal changes." *Id* at 20a.

Furthermore, the majority distinguished *Palazzolo* on the ground that the takings claim there was "as applied" and the property passed to the plaintiff before the claim was ripe. *Id.* at 15a-16a. Therefore, "justice may require that title transfers during the ripening period not bar the action." *Id.* The majority found that the Guggenheim's facial challenge does not warrant an extension of time "because the only time that matters is the time the ordinance was adopted." *Id.* at 16a.

The dissent found that the majority misapplied this Court's analysis of regulatory takings claims by "impermissibly" picking out one of three *Penn Central* factors and converting a three-factor balancing test into a "one-strike-you're-out checklist." *Id.* at 26a (internal quotations omitted). Citing Justice O'Connor's concurrence in *Palazzolo* in which she stated that no one factor is "talismanic," *Palazzolo*, 533 U.S. at 634, the dissent stated that the extent of interference with investment-backed expectations is "*one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" Pet. App. at 28a-29a. The dissent then analyzed the petitioners' claims under all three *Penn Central* factors finding that the ordinance effected a taking. *Id.* at 29a. Addressing the investment-back expectations of mobile home park

owners the dissent stated that the majority's opinion fails to provide support as to why a facial challenge should be analyzed differently than an as-applied challenge. *Id.* at 37a. In addition, the dissent chided the majority for adopting

> a static and somewhat simplistic view of law, politics and economics by failing to recognize that the Guggenheims had a reasonable expectation of freeing their land from the Ordinance through political or legal means, and by failing to acknowledge that this belief could influence the price they were willing to pay for the land.

Id. at 42a-43a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition and review the decision below because the rule announced in that decision would take away from small businesses a vital and oft-used tool that encourages the alienability of real property. The absence of that tool will depress the prices of land subject to suspect zoning ordinances, reduce the supply of viable commercial properties, and jeopardize the financing of small businesses that borrow against the value of their land.

I. Prior to the Decision Below, Small Businesses Regularly Challenged Pre-Existing Burdens On Their Land

Small businesses frequently buy land previously used for other purposes. It is not uncommon for such

a buyer to encounter a pre-existing burden on the land that did not sufficiently affect the prior owner to induce him to challenge the burden at the time it was initially enacted. Prior to the decision below, the mere fact that an ordinance pre-dated the sale of that land was not an obstacle to the subsequent purchaser challenging that ordinance in court.

Numerous cases illustrate this process. For example, in *City of Sherman* v. *Wayne*, 266 S.W.3d 34, 39-40 (Tex. App. 2008), James Wayne purchased a 9.3 acre parcel in Sherman, Texas from the Texas National Guard, which he planned to use for a truck driving school. A 1964 city zoning ordinance prohibited all commercial and industrial uses on the property, but the Guard had operated an armory and truck depot there for 35 years without that ordinance being enforced. *Id.* at 39. Mr. Wayne interpreted the city's inaction against the Guard to mean that the property was "grandfathered-in" and not subject to the zoning ordinance. *Id.* at 39-40. Only after he bought the land did Mr. Wayne learn that the City planned to enforce the zoning ordinance against his truck driving school. *Id.* at 40. After the city denied Mr. Wayne a zoning modification and special use permit, he sued. *Id.*

At trial, the jury found that the ordinance rendered the market value of the property zero. *Id.* Without the ordinance, the jury found the property to be worth $250,000. *Id.* The trial court entered a judgment in favor of Wayne holding that the ordinance amounted to a regulatory taking and awarded him $250,000 in damages. *Id.*

On appeal, the city argued that Mr. Wayne's claim lacked merit because Mr. Wayne "owns exactly what he bought—an old armory building on 9.3 acres of land zoned for residential use." *Id.* at 47. But the Texas Court of Appeals refused to consider that fact dispositive: "the simple fact that Wayne purchased the property years after the zoning ordinance was enacted does not bar his taking claim." *Id.* at 47 (citing *Palazzolo*, 533 U.S. at 626-29). To the contrary, the court found that Mr. Wayne purchased the property on the "firm belief" that the city would not enforce the zoning ordinance and that the "property could not be sold without incurring a loss." *Id.* at 46. Mr. Wayne's judgment was affirmed. *Id.* at 51.

Similarly, in *Vernon Park Realty, Inc* v. *City of Mount Vernon*, 121 N.E.2d 517, 518-19 (N.Y. 1954), a small realty company bought a lot adjacent to a railroad station from a railroad, wishing to open a new shopping center. The property had been zoned as residential 24 years earlier, but the city had allowed a parking garage and gas station to operate there. *Id.* When the realty company was denied a variance, the realty company sued. *Id.* at 519.

The city justified the ordinance "by reason of the congested traffic and parking conditions." *Id.* The New York Court of Appeals rejected this rationale stating that a solution to the traffic problem did "not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose." *Id.* The court found that the ordinance "operate[d] to destroy the greater part of the value of the property"

by precluding "the use for which [the property] is most readily adapted." *Id.* at 520.

The New York Court of Appeals also rejected the city's argument that the realty company's purchase of the land with notice of the ordinance precluded suit. *Id.* The court held that the "purchase of property with knowledge of the restriction does not bar the purchaser from testing the validity of the zoning ordinance since the zoning ordinance in the very nature of things has reference to land rather than to owner." *Id.* The court specifically ruled that "[k]nowledge of the owner cannot validate an otherwise invalid ordinance." *Id.*

In *Shatz* v. *Phillips*, 471 S.W.2d 944, 945 (Tenn. 1971) Sylvain and Elaine Shatz ran a scrap metal business in Union City, Tennessee. A building they used to assemble, process, and pack for sale different kinds of non-ferrous scrap, such as aluminum, copper, and brass, was zoned to permit industrial uses *except* "[t]he storage and/or salvaging of junk and other used material." *Id.* at 945-46. The Shatzes first used the building after the zoning ordinance was enacted, and continued until they were eventually cited by a building inspector. *Id.* at 945.

The Shatzes challenged the ordinance as arbitrary and capricious, and won in the trial court and in the intermediate appellate court. *Id.* The Supreme Court of Tennessee also affirmed, finding no rationale for singling out junk salvage in the zoning scheme. *Id.* at 947. The court rejected the city's argument that the Shatzes claim should fail because they knew of the ordinance when they took possession of the prop-

erty: "The [Shatzes] had the right to dispute the validity of Section 11—2003(b) as it applied to their use of the property after they had taken possession of it." *Id.* at 948.

The above rulings are just a sampling of the general rule applied both before and after this Court's ruling in *Palazzolo* that landowners may challenge regulatory burdens enacted prior to their purchase of the land. *See, e.g., La Salle National Bank* v. *City of Evanston*, 179 N.E.2d 673, 676 (Ill. 1962) ("A zoning ordinance cannot be sustained if in violation of the constitution, no matter how long or by whom it has been recognized as legal, and the fact that the purchaser . . . may have acquiesced in the classification will not estop him from testing its validity"); *State ex. rel. Shemo*, 765 N.E.2d 345, 352-353 (Ohio 2002) (citing *Palazollo* in rejecting the argument that a purchaser or successive titleholder is deemed to have notice of an earlier enacted land restriction, and is therefore barred from claiming the restriction effects a taking); *Kropf* v. *City of Sterling Heights*, 215 N.W.2d 179, 184 (Mich. 1974) (an otherwise unconstitutional ordinance does not lose this character and immunize itself from attack simply by the transfer of property from one owner to another); *City of Rome* v. *Pilgrim*, 271 S.E.2d 189, 191 (Ga. 1980) ("the mere fact that a zoning regulation is in effect at the time property is purchased does not preclude the purchaser from attacking its constitutionality").

II. The Decision Below, By Stripping Buyers of the Ability to Challenge Pre-Existing Burdens, Will Disrupt The Commercial Real Estate Market To The Disadvantage of Small Businesses

Prior to the decision below, a buyer of a parcel of land subject to a pre-existing burden could take a calculated risk and negotiate a discounted purchase price that handicapped the reality of the existing burden against the probability of getting the burden lifted in court. *See* Carol N. Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 Conn. L. Rev. 7, 61-62 (2003) ("If [parties to a land deal] were secure that the takings claim was alienable, they might negotiate a purchase price that reflects the discounted value of the property in its regulated state plus the value of the takings claim. . . . Even if unsuccessful, the successive interest holder, understanding that the right to pursue the takings claim is no guarantee of success, would have negotiated a purchase price . . . at which the successive interest holder would be satisfied to possess the property in its regulated state"). In the language of *Penn Central*, the "investment-backed expectations" of the buyer's likelihood of successfully challenging the ordinance is baked into the purchase price. *See also Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) ("The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional").

But with a rule against alienability of takings claims in place—such as the one endorsed by the court below—a buyer in need of unregulated land will have no choice but to look elsewhere. This is a losing proposition for all involved.

The seller of the burdened land will either have to challenge the regulation himself—an investment he may not be able to make—or sell into the limited pool of remaining buyers who are not affected by the ordinance. Selling into lesser demand of course results in an inferior price, as the cases in this area demonstrate. *See e.g. Chusud Realty Corp.* v. *Village of Kensington*, 22 A.D.2d 895, 897 (N.Y. App. Div. 1964) (Plaintiffs property was worth $40,000 to $120,000 if confined to the allowable uses under zoning restrictions but worth $670,000 if used as plaintiff desired.); *Moeller* v. *City of Moline*, 200 N.E.2d 93, 96 (Ill. App. 1964) (Defendant's expert conceded that plaintiff's property would be worth maximum of $7,500 if zoned residential and $12,000 if zoned industrial as plaintiff wished, whereas plaintiff's expert valued property at $6,800 if residential and $17,000 to $20,000 if zoned industrial.); *Bolger* v. *Village of Mount Prospect*, 141 N.E.2d 22, 25 (Ill. 1957) (Appraiser valued plaintiffs' property at $29,025 for residential purposes under the challenged ordinance and $116,100 for business purposes. Realtor estimated property's worth at 15,000 for residential purposes and $110,000 for commercial development).

A lower market price means more limited financing options for a small business that borrows against its land to finance its operations. A recent NFIB survey revealed that 63 percent of small businesses who

own their business premises borrow against it. *See* National Federation for Independent Business, National Small Business Poll, Vol. 8, Issue 7 (2008). Those business owners whose land is subject to a regulatory burden that cannot be transferred will have a hard time maintaining that financing if the decision below stands.

The flip side of the same coin is that buyers seeking suitably-zoned plots for their business will have fewer options to choose from. This reduced supply will increase prices for unburdened land, thus also increasing barriers to entry for entrepreneurs seeking to start or expand their small businesses. *See, e.g.*, Dep't of City Planning and the Cmty. Redevelopment Agency of the City of Los Angeles, Los Angeles' Industrial Land: Sustaining a Dynamic City Economy 4, 11 (Dec. 2007), *available at* http://cityplanning.lacity.org/Code_Studies/LandUseProj/Industrial_Files/Attachment%20B.pdf. ("Competition for industrially zoned land in Los Angeles is extremely high; industrial land in the City has the lowest vacancy rate in the nation, remaining consistently below two percent. Yet the supply of these critical job-producing areas is becoming increasingly scarce... With the regional Los Angeles economy thriving, industrial space will remain at a premium...."); District of Columbia Office of Planning, Industrial Land in a Post-Industrial City, District of Columbia Industrial Land Use Study: A Detailed Investigation of Industrial Land in the District of Columbia and role of Production, Distribution and Repair Industries in the District Economy 4, 70 (Aug. 2006) *available at* http://communityinnovation.berkeley.edu/presentation/industrial/DC-industrial-land-in-a-post-industrial-

city.pdf. ("Developable land of any type is scarce in Washington, DC and industrial land even more so...Unlike the suburban markets, where industrial space...generally remains after the larger leases are signed, small space leases are at a premium in the District").

In sum, a rule barring the alienability of takings claims hurts both the holders and buyers of land burdened by suspect ordinances. As petitioners here explain, this not the law, but if it were the law, it would have dire consequences for many small businesses, and for the 49.6 percent of private sector workers they employ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 10-1125

In the
Supreme Court of the United States

DANIEL GUGGENHEIM, et al.,

Petitioners,

v.

CITY OF GOLETA, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION, CRV ENTERPRISES, INC., AND C. RYAN VOORHEES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Notwithstanding this Court's contrary ruling in *Palazzolo v. State of Rhode Island*, may a property owner be barred from challenging a land use restriction as a regulatory taking solely because the regulatory restrictions were enacted before he purchased the property?

2. Notwithstanding the three-pronged balancing test for regulatory takings established by this Court in *Penn Central Transportation Co. v. City of New York*, may a takings claim be resolved against a landowner solely on the basis of the appellate court's economic theories?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION 4

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE PROPER APPLICATION OF *PENN CENTRAL*, AND TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS ON THIS ISSUE OF NATIONWIDE IMPORTANCE 7

A. By Impermissibly Collapsing *Penn Central*'s Three-Part Balancing Test into a Single Inquiry, the Decision Below Conflicts with the Precedent of This Court and the Interpretation of *Penn Central* by Other Circuits 9

B. Certiorari Should Be Granted To Clarify That Appellate Courts May Not Substitute Their Own "Pet" Economic Theories for the Factual Evidence Required To Evaluate a *Penn Central* Claim 10

TABLE OF CONTENTS—Continued

Page

C. Certiorari Should Be Granted To Clarify That the Test of "Reasonable" or "Distinct" Investment-Backed Expectations Is *Not* Whether the Plaintiff Correctly Predicts the Outcome of Litigation 13

II. CERTIORARI SHOULD BE GRANTED TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS IN THE PROPER APPLICATION OF *PALAZZOLO v. RHODE ISLAND* 15

A. *Palazzolo* Established That Takings Claims Survive a Transfer of Ownership After the Adoption of Measures To Restrict the Use of Property 16

B. The Ninth Circuit's Reinterpretation of *Palazzolo* As Applying Only When Regulated Property Is Transferred by Operation of Law Is Not Supported by the Language or Rationale of *Palazzolo* Itself, and Conflicts with Decisions of Other Circuits That Have Correctly Applied *Palazzolo* 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles, 14 P.3d 930 (Cal. 2001) 2

Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004), *op. withdrawn on rehearing*, 415 F.3d 1027 (9th Cir. 2005) 2

Castaneda v. Olsher, 162 P.3d 610 (Cal. 2007) 2

CRV Enterprises, Inc., & C. Ryan Voorhees v. United States, No. 10-1151 (U.S. filed Mar. 17, 2011) 3

Galland v. City of Clovis, 16 P.3d 130 (Cal. 2001) 2

Montclair Parkowners Ass'n v. City of Montclair, 264 F.3d 829 (9th Cir. 2001) 2

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) 1, 19

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1, 3-6, 15-19

Palazzolo v. State of Rhode Island, 746 A.2d 707 (R.I. 2000) 17

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TABLE OF AUTHORITIES—Continued

Page

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 1

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Yee v. City of Escondido, 503 U.S. 519 (1992) 2

United States Constitution

U.S. Const. amend. V 1-2, 4, 9

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Rule of Court

Sup. Ct. R. 37.2(a) 1

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Page

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Pacific Legal Foundation (PLF), Western Manufactured Housing Communities Association (WMA), CRV Enterprises, Inc., and C. Ryan Voorhees respectfully submit this brief amicus curiae in support of Petitioners Daniel Guggenheim, et al. (the Guggenheims).[1]

INTEREST OF AMICI CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of litigating matters affecting the public interest. Representing the views of tens of thousands of members and supporters, PLF is an advocate of individual rights, including the fundamental right to own and make productive use of private property.

PLF attorneys have litigated many leading cases before this Court and around the nation arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments. PLF attorneys were counsel of record in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

PLF is keenly aware of the plight of owners of mobile home parks in California, whose right to make

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[1] In accordance with Rule 37.2(a), PLF provided ten days' notice to all counsel of record of its intention to file this amicus brief. The parties have issued general consents to the filing of amicus briefs in this matter, which have been duly lodged with the Court.

No counsel for a party authored any portion of this brief and no such counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person or group made a monetary contribution intended to fund the preparation or submission of this brief.

productive use of their land is frequently abused by local jurisdictions that are under the political influence of park tenants. PLF attorneys have represented park owners or filed amicus briefs challenging the constitutionality of particularly onerous mobile home rent control ordinances in numerous cases, including *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004), *op. withdrawn on rehearing*, 415 F.3d 1027 (9th Cir. 2005), and *Montclair Parkowners Ass'n v. City of Montclair*, 264 F.3d 829 (9th Cir. 2001). PLF filed a brief amicus curiae in support of the Guggenheims in the proceedings below.

WMA is the nation's largest trade organization representing mobile home park owners in California and the nation. WMA's members own, operate, and control over 1,800 parks throughout California, with approximately 180,000 resident spaces. WMA's activities include educational programs and legislative and judicial advocacy, including amicus curiae appearances in leading cases before this Court and the California Supreme Court, including *Yee*, 503 U.S. 519, *Castaneda v. Olsher*, 162 P.3d 610 (Cal. 2007), *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 14 P.3d 930 (Cal. 2001), and *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001). WMA filed a brief amicus curiae in support of the Guggenheims in the proceedings below.

WMA's members are interested in this case because it raises an important issue that profoundly affects their industry: the extent to which the Fifth Amendment Takings Clause protects owners of mobile home parks against confiscatory rent and vacancy control regulation.

CRV Enterprises, Inc., is a real estate development firm doing business in northern California. C. Ryan Voorhees is the director, president, and primary managing officer of CRV Enterprises, Inc. Mr. Voorhees and his firm (collectively, CRV) are Petitioners before this Court in *CRV Enterprises, Inc. & C. Ryan Voorhees v. United States*, No. 10-1151 (U.S. filed Mar. 17, 2011). In that case, the Federal Circuit Court of Appeals held that CRV lacked standing to bring a regulatory takings claim because it did not own the property in question at the time the regulatory scheme was adopted. CRV regards the holding in that case to be a variation of the Ninth Circuit's en banc ruling in the case at bar: that regulatory takings claims may be extinguished by a mere transfer of title to property subject to the regulatory regime. For that reason, CRV is vitally interested in a reaffirmation of this Court's *Palazzolo* doctrine, which established that such claims survive the sale of regulated property.

These Amici seek to provide this Court with an additional viewpoint on two important issues in this case. First, the regulatory takings doctrine of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), requires courts to weigh and balance each of three different factors in determining whether takings liability has accrued. It is a fundamental doctrinal error to rule that a takings claim cannot succeed if the government prevails on only one of these three criteria, as the Ninth Circuit ruled in the majority opinion below. This error is compounded when the single criterion on which the city prevailed (the Guggenheims' supposed lack of distinct, investment-backed expectations) was decided not by the ad hoc factual showing required by *Penn Central*,

but by the court's speculative recitations of economic theory.

Second, Amici seek to impress upon this Court the importance of maintaining a broad and reasoned interpretation of the rule of *Palazzolo v. Rhode Island*, that takings claims cannot be barred solely because unconstitutional restrictions were already in place at the time the plaintiffs acquired the property. If *Palazzolo* is narrowed to preclude post-enactment purchasers from filing takings challenges to restrictive land use regulations, as the Ninth Circuit ruled below, it would empower virtually any governmental entity to "put an expiration date on the Takings Clause." *Palazzolo*, 533 U.S. at 627.

INTRODUCTION

This case involves a Fifth Amendment takings challenge to a regulatory wealth transfer effected by the City of Goleta's mobile home park rent control ordinance. Petition for Writ of Certiorari Appendix (Pet. App.) 8a. The property was already subject to rent control under a Santa Barbara County ordinance at the time the Guggenheims purchased it. Pet. App. 6a. When the City of Goleta was incorporated and adopted the county's rent ordinance as its own, the Guggenheims sued the city for effecting a regulatory taking of their property. Pet. App. 7a-8a.

In September of 2009, a three-judge panel of the Ninth Circuit struck down Goleta's ordinance, applying the three-part balancing test of *Penn Central*. See Pet. App. 55a (Appendix B). The panel opinion by Judge Bybee considered each of the three factors in turn and found that both the character of the regulation (a "naked wealth transfer") and its economic impact (an

80%-90% reduction in the park's value) favored the Guggenheims. Pet. App. 103a-108a. On the other hand, the owners' investment-backed expectations were weak, in the sense that the park's rents had previously been regulated. Pet. App. 108a-116a. Weighing and balancing each of these three factors as required by *Penn Central*, the panel concluded that Goleta's rent control law was unconstitutional. Pet. App. 122a-123a.

The city's motion for rehearing en banc was granted, and on December 22, 2010, a divided eleven-judge en banc panel of the Ninth Circuit rejected the Guggenheims' takings claim. Judge Kleinfeld's opinion for the en banc majority found it dispositive that the plaintiffs purchased their park after the Santa Barbara County ordinance was already in effect. Pet. App. 18a. According to the majority below, a post-enactment purchaser could have no distinct, investment-backed expectation that rent control would ever be struck down as unconstitutional, and the Guggenheims' claim was therefore barred as a matter of law. Pet. App. 19a.

SUMMARY OF ARGUMENT

The Ninth Circuit's en banc opinion directly conflicts with *Palazzolo* and is inconsistent with the requirements of *Penn Central* in important respects. Instead of evaluating and weighing each of *Penn Central*'s "relevant factors," as did the 2009 three-judge panel, the decision below gives determinative effect to a single factor—the Guggenheims' post-enactment purchase of the park. As was noted by the dissent, this approach impermissibly "converts a three-factor balancing test into a 'one-strike-you're-out' checklist." Pet. App. 26a. Moreover, the central premise cited by

the majority in support of its reasoning, that the Guggenheims acquired the park for a price that was discounted to offset the economic impact of rent control, was based on no factual evidence whatsoever, but was solely a product of the court's own economic theorizing. Finally, the Ninth Circuit evaluated the reasonableness of the Guggenheims' investment-backed expectations in terms of whether the park owners had correctly foreseen the outcome of this very litigation. Such an approach renders the expectations prong of *Penn Central* circular and tautological, since by definition owners who successfully strike down land use restrictions in court will be found to have had reasonable expectations of the unregulated use of their property, while those who fail will not.

The opinion below would effectively restore the regulatory "Notice Rule" that was struck down by this Court in *Palazzolo*. If restrictive land use regulations are immunized against takings lawsuits by the mere sale of regulated property, as the Ninth Circuit ruled below, the government "would be allowed, in effect, to put an expiration date on the Takings Clause." *Palazzolo*, 533 U.S. at 627. The purported distinction advanced by the Ninth Circuit—that Anthony Palazzolo acquired his regulated property by operation of law, while the Guggenheims purchased theirs—is of no legal significance, and if taken seriously would limit *Palazzolo* to its facts, depriving property owners throughout the Ninth Circuit of important constitutional protections enjoyed by the residents of every other Circuit.

This Court should grant the Petition for Writ of Certiorari to restore uniformity among the Circuits in the treatment of regulatory takings claims brought by

plaintiffs who purchase property subject to unconstitutional regulations.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE PROPER APPLICATION OF *PENN CENTRAL*, AND TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS ON THIS ISSUE OF NATIONWIDE IMPORTANCE

All parties agree that the Guggenheims' regulatory takings claim is governed by the framework set out by this Court in *Penn Central*, 438 U.S. 104. Under that decision, takings liability turns on an "essentially ad hoc, factual inquiry":

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Id. at 124 (citation omitted). Instead of engaging in this three-pronged factual inquiry, however, the en banc panel below resolved the Guggenheims' *Penn Central* claim solely on the basis of the court's own speculations concerning the price the plaintiffs may have paid for their park. With no evidence before it, the majority confidently theorized that "the price they paid for the mobile home park *doubtless* reflected the burden of rent control they would have to suffer." Pet. App. 18a (emphasis added). Thus, to the en banc panel, the mere fact that the Guggenheims purchased

their park after the county's rent control law had been adopted was "fatal to the Guggenheims' claim." *Id.*

This ruling departs from this Court's *Penn Central* doctrine and conflicts with other courts' interpretations of *Penn Central* in three important respects. First, *Penn Central* on its face requires courts to examine, weigh, and balance three separate factors in determining whether liability for a taking has been incurred. Instead, the decision below elevates a single element of this calculus to determinative status—the relationship of the date of acquisition to the date of the regulatory enactment. Second, *Penn Central* emphasizes the need for a case-by-case *factual* inquiry. Instead, with no facts before it, the panel below resolved the case entirely on the basis of its own speculative application of economic theory. Finally, the en banc panel determined that the Guggenheims' investment-backed expectations were insufficiently "reasonable" or "distinct" entirely by reference to the fact that, at the time they purchased their property, the Guggenheims incorrectly anticipated that the majority opinion in this case would overturn Goleta's regulatory wealth transfer, rather than uphold it. Neither this Court nor any other court has placed such a narrow, self-referential interpretation on *Penn Central*'s expectations prong, which would render the entire takings inquiry circular and meaningless.

A. By Impermissibly Collapsing *Penn Central*'s Three-Part Balancing Test into a Single Inquiry, the Decision Below Conflicts with the Precedent of This Court and the Interpretation of *Penn Central* by Other Circuits

Although none of *Penn Central*'s three "relevant considerations" for establishing takings liability is defined with precision, subsequent opinions and virtually all commentators agree that reviewing courts must evaluate and weigh all three factors to determine whether, on balance, a violation of the Fifth Amendment has occurred. *See, e.g.*, J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Sw. U. L. Rev. 351, 398-99 (2005) ("[t]o comport with *Palazzolo*, courts must consider and balance *all* the relevant partial takings factors before determining whether a taking has occurred, regardless of the outcome of the investment-backed expectations criterion"); Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 Va. Envtl. L.J. 43, 66-67 (2004) ("The investment-backed expectations factor must be weighed and balanced against the other two factors . . . . For that reason, a landowner need not necessarily prove that the regulation frustrated distinct investment-backed expectations in order to prevail on her partial takings claim.").

In contrast, the majority below erroneously collapsed *Penn Central*'s three-factor balancing test into a single criterion. The mere fact that Santa

Barbara County's rent control ordinance had been adopted prior to the Guggenheims' acquisition of their property meant, according to the Ninth Circuit, that the owners could have no investment-backed expectations of ever being free of rent control, and this fact alone was "fatal to the Guggenheims' claim." Pet. App. 18a.

It has long been recognized that elevating the timing of acquisition to dispositive status in resolving *Penn Central* claims is unsupportable as a matter of either logic or law. *See, e.g.*, Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 Haw. L. Rev. 533, 565-67 (2002) (noting the circularity of the argument that the state may unilaterally extinguish property rights if subsequent buyers are deemed to have no reasonable expectation that those rights can be enforced in court). It is more important, however, for this Court to seize this opportunity to clarify that *Penn Central* does not permit the resolution of takings claims by reference to *any* single factor, standing alone.

B. Certiorari Should Be Granted To Clarify That Appellate Courts May Not Substitute Their Own "Pet" Economic Theories for the Factual Evidence Required To Evaluate a *Penn Central* Claim

The Ninth Circuit en banc panel adversely resolved the Guggenheims' *Penn Central* claim solely on the grounds that the plaintiffs had purchased their mobile home park after the adoption of Santa Barbara County's rent control ordinance. Pet. App. 18a. The significance of the post-enactment purchase, according to the majority below, is that the Guggenheims supposedly "bought the property for a low price

reflecting the economic effect of the regulation." Pet. App. 15a. Again, the court insisted, "the price they paid for the mobile home park *doubtless* reflected the burden of rent control they would have to suffer." Pet. App.18a (emphasis added). And yet again, "[t]he Guggenheims *doubtless* paid a lot less for the stream of income mostly blocked by the rent control law than they would have for an unblocked stream." Pet. App. 21a-22a (emphasis added).

It would not be an overstatement to say that the entire decision below turns on this point. The majority did not seriously consider the abundant factual evidence before it regarding the nature of the regulation (a "naked wealth transfer" with no offsetting social benefits), or its economic impact (at least an 80% reduction in the value of the park). Both these factors were simply folded into the court's singular fixation on the timing of acquisition. *See, e.g.*, Pet. App. 18a (dismissing the "character" inquiry by noting that the Goleta Ordinance was a continuation of the Santa Barbara County ordinance, which was enacted before the Guggenheims acquired title.). Rather, the takings claim was foreclosed entirely on the court's assertion that the Guggenheims could have had no distinct, investment-backed expectation of ever being free of rent control, because the full economic impact of the ordinance had "*doubtless*" been discounted into the price they paid for the park. *Id.*

Given the crucial nature of this point to the entire fabric of the majority opinion, one is entitled to ask, *how does the court know?* What price *did* the Guggenheims pay, and did it reflect the expectation—as Judge Kleinfeld's opinion repeatedly insists—that the rent ordinance would remain in

effect, illegally depressing the park's revenues in perpetuity? Or did it incorporate the reasonable expectation of both parties—seller and buyer—that the then-existing restrictions were patently unconstitutional, and would surely be struck down in court at the first opportunity?

Amazingly, the record before the Ninth Circuit contained *no evidence on this issue whatsoever!* Judge Kleinfeld felt so confident of the price the Guggenheims "*must*" have paid that he based his entire opinion upon it, yet in truth neither he nor any other member of the en banc panel could cite to even a shred of factual evidence in the record to support this empirical claim. Even more remarkably, the majority clearly implies that the facts are irrelevant, to the extent they might fail to conform to Judge Kleinfeld's economic theories. At one point the opinion below seems to concede that the price of the park "might conceivably" have reflected the parties' belief that the rent control law was unconstitutional and would be overturned. Pet. App. 19a. But, according to Judge Kleinfeld, any such real-world component of the price should simply be ignored, because it would comprise a "speculative premium[!]" *Id.* What mattered to the majority was not what the Guggenheims might *actually* have paid for their property, but what the majority's theoretical speculations suggested they *must* have paid!

Ironically, in electing to ignore the ample factual evidence that had been proffered concerning the character of Goleta's wealth-transferring rent ordinance, the majority opinion calls for courts to refrain from deciding constitutional questions on the basis of "Economics 101." Pet. App. 24a. Yet the sole

support for the majority's opinion is the substitution of the court's own elementary, unsupported economic theorizing for the determination of essential factual questions by the trial court.

This Court should grant certiorari to definitively establish that *Penn Central*'s inherently fact-driven inquiry cannot be resolved or foreclosed solely on the basis of an appellate court's speculative economic theories, no matter how firmly or passionately held.

C. Certiorari Should Be Granted To Clarify That the Test of "Reasonable" or "Distinct" Investment-Backed Expectations Is *Not* Whether the Plaintiff Correctly Predicts the Outcome of Litigation

The opinion below determined the Guggenheims' investment-backed expectations to be insufficiently reasonable or distinct because they incorporated a belief that the previously enacted rent regulations were unconstitutional and would be overturned. "[The Guggenheims] could have no 'distinct investment-backed expectations' that they would obtain illegal amounts of rent"—*i.e.*, rents that were not artificially depressed to finance a politically engineered wealth transfer. Pet. App. 19a. In effect, the opinion finds the Guggenheims' expectations to have been unreasonable because they anticipated that the rent ordinance might be struck down—as it was by Judge Bybee's 2009 panel opinion in this case—rather than upheld, as it was by Judge Kleinfeld's 2010 en banc opinion. In terms of the en banc panel, the court found the Guggenheims' investment-backed expectations to be unreasonable because the plaintiffs incorrectly foresaw the votes of three Ninth Circuit

judges. If any three members of the en banc majority below had switched their votes, Goleta's rent control ordinance would today be recognized as unconstitutional, rents in the Guggenheims' park would be unregulated, and their investment-backed expectations would have been fully realized. But because of those three votes, rent control survives, and the Guggenheims' expectations were therefore found by the en banc panel to be unreasonable.

Neither this Court nor any other court has ever held—prior to the opinion below—that *Penn Central*'s investment-backed expectations prong is to be evaluated in terms of the accuracy with which a plaintiff can predict the outcome of litigation. Rather, this element of the *Penn Central* test merely asks whether the plaintiff has invested resources in pursuit of some "distinctly perceived, sharply crystallized" expected use of the property. *See* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1233 (1967). Here, there can be no doubt that the Guggenheims invested in their property in the expectation that it might one day operate without the constraints of rent control. The outcome of subsequent litigation might vindicate this expectation, or extinguish it. But the ultimate outcome of the Guggenheims' litigation cannot, in itself, determine whether their investment-backed expectations were sufficiently reasonable or distinct to satisfy the *Penn Central* analysis.

II

CERTIORARI SHOULD BE GRANTED TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS IN THE PROPER APPLICATION OF *PALAZZOLO v. RHODE ISLAND*

The Ninth Circuit's error in resolving this case solely on the basis that the Guggenheims were post-enactment purchasers is especially remarkable because it was specifically addressed and rejected by this Court in *Palazzolo v. State of Rhode Island*. Justice Kennedy's majority opinion underscored the problem and reversed a state court decision that rested precisely on the thesis of the majority below:

> by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

Palazzolo, 533 U.S. at 626. Even Justice O'Connor's concurrence in *Palazzolo*, which would allow notice of preexisting regulations to be considered in determining an owner's investment-backed expectations, cannot be employed, as the Ninth Circuit did below, to completely bar takings claims without consideration of the remaining *Penn Central* factors:

> If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much

> power to redefine property rights upon passage of title.

Id. at 636 (O'Connor, J., concurring). Because the opinion below essentially limits *Palazzolo* to its facts, property owners within the Ninth Circuit's jurisdiction will now be deprived of the benefit of this Court's doctrine, unless certiorari is granted and the en banc opinion is overruled.

A. *Palazzolo* Established That Takings Claims Survive a Transfer of Ownership After the Adoption of Measures To Restrict the Use of Property

In *Palazzolo*, this Court was asked to determine whether a property owner "deemed to have notice of an earlier-enacted restriction . . . is barred from claiming that it effects a taking." 533 U.S. at 626. The case was thought to be the culmination of a judicial trend that gained momentum throughout the 1990s, whereby takings claims were summarily dismissed under the so-called "Notice Rule": when the title to property changes hands, the new owner is deemed to have purchased with notice of all existing land use regulations, and is forever barred from challenging them as violating the Takings Clause. *Id.*

This rule was applied by the Rhode Island Supreme Court when Anthony Palazzolo sued for a taking, based on the denial of his application to develop wetlands on his property. The state court held that, because restrictive wetlands regulations had been adopted before Palazzolo acquired title to the parcel, he was precluded from bringing a takings claim based on the impact of the regulations on his land:

> Here, when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired.

Palazzolo v. State of Rhode Island, 746 A.2d 707, 716 (R.I. 2000). A claim for a taking, under this doctrine, could be stated *only* by the owner of record at the time restrictive measures are adopted. Any subsequent transfer of title forever extinguishes any possibility of bringing such a claim, since "all subsequent owners take the land subject to the pre-existing limitations without the compensation owed to the original acquiring owner." *Id.* at 716-17.

Reversing the Rhode Island Supreme Court in *Palazzolo*, this Court flatly rejected the Notice Rule. A doctrine that bars post-enactment buyers from challenging regulations under the Takings Clause would impermissibly allow the State to "shape and redefine property rights . . . and subsequent owners cannot claim any injury from lost value." 533 U.S. at 626. Writing for the majority, Justice Kennedy observed that such a rule

> would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.

Id. at 627.

Unfortunately, the attractiveness of the Notice Rule to courts seeking a quick and clean way to resolve takings claims in favor of the government has proven

stronger than the force of its repudiation in *Palazzolo*. Many lower courts, both state and federal, have continued to apply the Notice Rule *de facto*, routinely barring subsequent purchasers from asserting regulatory takings claims under a wide variety of pretexts. *See* Breemer & Radford, *supra*, at 402-17. The case at bar exemplifies such an exercise in judicial ingenuity.

B. The Ninth Circuit's Reinterpretation of *Palazzolo* As Applying Only When Regulated Property Is Transferred by Operation of Law Is Not Supported by the Language or Rationale of *Palazzolo* Itself, and Conflicts with Decisions of Other Circuits That Have Correctly Applied *Palazzolo*

The court below clearly recognized the obvious tension between its ruling and the teaching of this Court in *Palazzolo*. In order to uphold the City of Goleta's wealth transfer, the Ninth Circuit therefore was required to effectively limit *Palazzolo* to its facts:

> [E]ven though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property . . . .

Pet. App. 15a. As Judge Bea pointed out in dissent, this and other superficial distinctions cited by the *Guggenheim* majority to justify its circumvention of *Palazzolo* "are mere differences, no more significant

than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California." *Id.* at 36a-37a (Bea, J., dissenting). But this particular distinction was of crucial importance to the majority's conviction that any subsequent *buyer* of regulated property must "doubtless" pay a price that is discounted to offset any economic impact of the regulation.

Although this reinterpretation of *Palazzolo* was essential to allow the majority below to resolve the Guggenheims' takings claim on the basis of the court's own economic theories, the Ninth Circuit's purported distinction conflicts with both the language and rationale of *Palazzolo* itself. The *Palazzolo* Court expressly rejected the Rhode Island rule that "[a] *purchaser* or a successive title holder" is barred from claiming that a preexisting regulation effects a taking. 533 U.S. at 626. Reiterating, this Court repudiated "the argument that postenactment *purchasers* cannot challenge a regulation under the Takings Clause." *Id.* (emphasis added). And the Court took pains to tie its holding in *Palazzolo* to its previous rejection of the Notice Rule in *Nollan v. Cal. Coastal Comm'n*—a case in which the plaintiffs prevailed on their takings claim despite having purchased their property in an arms-length transaction long after the Coastal Commission's unlawful permit exactions had been statutorily authorized. 483 U.S. at 833 n.2.

Morever, limiting *Palazzolo* to situations in which post-enactment owners acquire their property by means other than purchase flatly conflicts with the precedent of other federal and state courts that have faithfully followed this Court in rejecting the Notice Rule. The opinion below thereby brings the Ninth

Circuit into conflict with decisions of the Federal Circuit (*Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009)); and the Supreme Courts of Ohio (*State ex. Rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002)) and Minnesota (*Wensmann Realty, Inc. v. City of Egan*, 734 N.W.2d 263 (Minn. 2007)).

Because the en banc decision below is now the law of the Ninth Circuit, its sharp departure from the doctrine of this Court and other federal and state courts on a fundamental principle of constitutional law means that similarly situated citizens will receive radically different levels of protection under the Takings Clause, depending on whether their property lies within the jurisdiction of the Ninth Circuit, or outside it. This intolerable conflict can only be corrected by this Court, which should take the first step toward doing so by granting the Guggenheims' petition for writ of certiorari.

CONCLUSION

The Petition for Writ of Certiorari to the Ninth Circuit should be granted.

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Respectfully submitted,

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